82-1916

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EMPRESA ECUATORIANA DE AVIACION, S.A.,

Petitioner,

vs.

DISTRICT LODGE NO. 100,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
J.G. CATES AND JULIANA MENOSCAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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CHAS. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal district court may substitute its judgment for the business judgment of an employer by scrutinizing individual strike replacements, hired to replace airline employees engaged in an unlawful strike under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.*, when the employer's replacement decisions are made without union animus and based on valid business judgments as to which jobs are necessary for continuing operations.

2. Whether airline employees held to be unnecessarily replaced after engaging in an unlawful strike under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.*, are entitled to back pay.

3. Whether airline employees properly replaced after engaging in an unlawful strike under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.*, are entitled to preferential rehire rights when their replacements quit or vacancies arise.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Empresa Ecuatoriana de Aviacion, S.A., by its attorney, Harry Sangerman, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on November 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals (App. at A-1) is reported at 690 F.2d 838 (11th Cir. 1982). The opinion of the United States District Court for the Southern District of

Florida, No. 79-1795 (S.D. Fla. April 15, 1980)(App. at A-20) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1982. A timely petition for a rehearing en banc was denied on December 30, 1982. (App. at A-18). The petitioner submitted an application for an extention of time to file a petition for a writ of certiorari, and Justice Lewis F. Powell, by order dated March 11, 1983 (App. at A-92) granted an extension to and including May 29, 1983. This petition for a writ of certiorari has been filed within the aforestated time period. This Court's jurisdiction to review the Court of Appeals November 1, 1982 judgment is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Railway Labor Act, as amended, 45 U.S.C. § 151 *et. seq.*, are as follows:

> § 151a. The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.
>
> § 152, First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable

effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

I. The Facts

The petitioner (hereinafter referred to as "the Employer") scheduled a computer training session for its reservation department employees to be held on April 9, 1979 and to be conducted on a ticket counter computer. The respondent (hereinafter referred to as "'the Union") threatened to strike if the training session was held because it believed that the Employer would "cross-utilize" personnel from the ticket counter and reservation departments in violation of the parties' collective bargaining agreement. The Employer assured the Union in writing that no cross-utilization would occur, that the union contract expressly allowed such training sessions, and that any dispute should be referred to the arbitration process.

On April 6, 1979, an attorney for the Union advised employees that they could not legally strike over the training session issue. On April 8, 1979, four station agents called in sick and the Employer began experiencing several acts of sabotage. Baggage carts were vandalized, ticketing machines suspiciously malfunctioned, a false announcement was communicated and harassing phone calls were received. On April 8, 1979, management was assured by the Union that there would be no strike on the first day of the computer training session. However, beginning at 12:00 noon on April 9, 1979, the employees went out on strike.

On April 9 and 10, 1979, the Employer began to replace some of the striking employees in positions that it deemed essential to continued operations of the airline. All striking

employees were advised that they were subject to replacement. There was no evidence that replacements were hired because of unlawful or discriminatory reasons. Rather, replacement decisions were made pursuant to the business judgment of managers on duty at the time of the strike.

On April 12, 1979, the District Court for the Southern District of Florida entered a temporary restraining order enjoining the strike and ordering employees to return to work. The Employer immediately ceased hiring replacements and those striking employees who had not been replaced returned to work on April 13, 1979. Because there were no jobs for striking employees who had been replaced, the Union requested that the Court restore the status quo to the time prior to the hiring of replacements and to reinstate all strikers. The Court refused to grant this relief but conducted a hearing beginning on April 19, 1979 to decide whether the Employer was justified in replacing each employee.

II. The Decision Of The District Court

The District Court held, *inter alia*, that the Employer, in response to an illegal strike pursuant to a "'minor dispute" under the Railway Labor Act, 45 U.S.C. § 151 *et. seq*, could lawfully replace striking employees in order to sustain operations. However, the Court scrutinized each individual replacement and determined that four replacements were unnecessary to continue operations. It ordered these four employees reinstated but without back pay, because in the Court's view, "the strike was both illegal and violative of the collective bargaining agreement; it was the strikers who put themselves in the position of being out of work [and] to hold otherwise would allow the strikers to enrich themselves unjustly." (App. at A-80) The District Court did not address the issue of preferential rehire rights for returning strikers who were held to be properly replaced.

III. The Decision Of The Court Of Appeals

The Court of Appeals affirmed the District Court's holding that the Employer could lawfully replace strikers to the extent reasonably necessary to continue operations during the strike. The Court also affirmed the District Court's authority to examine each individual replacement, but reversed that portion of the opinion which denied back pay to unnecessarily replaced strikers, notwithstanding the illegality of the strike. The Court of Appeals reasoned that back pay should not be considered a punishment for an employer or a means of disciplining erring strikers, but rather "the price of reconstructing the status quo." (App. at A-16) The Court further ruled that properly replaced strikers were entitled to be placed on a preferential hiring list to be utilized when vacancies occurred.

REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari should be granted in order to establish a consistent legal framework within which employers subject to the Railway Labor Act may respond to an illegal strike by airline employees. For all practical purposes, the Court of Appeals decision fosters illegal strike activity and severely restricts an employer from performing its obligation under the Railway Labor Act to continue operations during a strike.

A federal district court should not be permitted to substitute its judgment for the sound business judgment of management professionals who are trained to handle all types of emergency situations, including an illegal, virtually unannounced strike. This court plainly held in *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966), that a carrier subject to the Railway Labor Act has a duty to continue operations during a strike and it "owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been

exhausted and self-help becomes available to both sides of the labor-management controversy." 384 U.S. at 245.

Although both lower courts were correct in deciding that this duty to continue operations includes the right to hire replacements for striking employees, the District Court acted without any legal basis by second-guessing management's individual replacement decisions and holding that certain replacements were unnecessary. Such unwarranted judicial intervention in management decision making will create a chilling effect upon employers faced with the need to take prompt action during an emergency strike situation. If employers fear that their business judgment will be overturned by the federal courts, they will hesitate to hire certain replacements in all but the most compelling circumstances. As a result, an employer's duty to serve the public during labor-management controversies will be severely impaired. An employer's replacement decisions during an unlawful strike should not be disturbed unless the evidence shows that the employer made such decisions in a discriminatory or unlawful manner. This is the more logical rule and one which comports with an employer's statutory obligation to serve the public under this Courts pronouncement in *Railway Clerks*, 384 U.S. 238 (1966).

Moreover, the Court of Appeals erred in holding that four employees deemed to be unnecessarily replaced were entitled to back pay. The District Court correctly reasoned that the strikers had placed themselves in the position of being out of work by engaging in an unlawful strike and to award back pay would allow the strikers to enrich themselves unjustly. Additionally, as noted above, a back pay award under the circumstances places an employer in a position of fulfilling its statutory obligation to continue operations during a strike at the peril of a substantial monetary loss.

It is well settled that a strike by airline employees pursuant to a "minor dispute" under the Railway Labor Act is unlawful. *Trainmen* v. *Chicago R. & I. R. Co.* 353 U.S. 30 (1957). The strike in this case also was violative of the

parties' collective bargaining agreement which contained a no-strike clause. This Court and the federal courts of appeal have traditionally denied reinstatement or back pay to employees engaged in an unlawful strike or violating a no-strike clause under the National Labor Relations Act, 29 U.S.C. § 151 *et. seg.* (hereinafter referred to as "the NLRA"). *Labor Board* v. *Fansteel Corp.*, 306 U.S. 240 (1939); *NLRB* v. *Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *NLRB* v. *Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366 (9th Cir. 1954). This Court often has looked to the NLRA as a basis for interpreting the Railway Labor Act. *See Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369 (1969); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944). Accordingly, the principles developed under the NLRA are apposite in the present case and justify a denial of back pay.

The Court of Appeals also erred in holding that properly replaced strikers were entitled to be placed on a preferential hiring list to be utilized when their replacements quit or vacanies occurred. The concept of placing returning strikers on a preferential hiring list arose under the NLRA subsequent to this Court's decision in *Labor Board* v. *Mackay Co.*, 304 U.S. 333 (1938). In *Mackay*, this Court upheld an employers' right to replace striking employees with others in an effort to carry on its business during a *lawful* economic strike. This Court further held in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), that lawful strikers were entitled to reinstatement if and when a job for which the striker is qualified becomes available.

Preferential rehire rights under the NLRA have never been granted to unlawful strikers. Rather, employees who engage in illegal strike activity or who strike in violation of a no strike clause lose the protections of the NLRA, and an employer is entitled to terminate them from employment. *See Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270 (1956); *Labor Board* v. *Fansteel Corp.*, 306 U.S. 240 (1939); *Dow Chemical Co.* v. *NLRB*, 636 F.2d 1352 (3rd Cir. 1980); *NLRB* v. *Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963). It was inconsistent

and a distortion of judicial precedent for the Court of Appeals to require preferential rehire rights, a remedy developed under the NLRA, without looking to that statute to distinguish between a lawful and unlawful strike.

The practical effect of the Court of Appeals' decision is to encourage airline employees to engage in illegal conduct without jeopardizing their employment status in the least. Such a result is not in line with this Court's decisions and is contrary to the purpose of the Railway Labor Act to prevent strikes and to provide service to the public during labor-management controversies.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

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EMPRESA ECUATORIANA DE AVIACION, S.A.,
Plaintiff-Appellee, Cross-Appellant,

v.

DISTRICT LODGE NO. 100, et al.,
Defendants-Appellants, Cross-Appellees.
No. 80-5349.

United States Court of Appeals, Eleventh Circuit.
Nov. 1, 1982.

Manners, Amoon, Whatley & Tucker, Jos. P. Manners, Miami, Fla., Plato E. Papps, Gen. Counsel, IAMAW, Washington, D.C., for defendants-appellants, cross-appellees.

Manas & Marcus, Richard I. Manas, Miami, Fla., Alan Greene, Coconut Grove, Fla., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY and WOOD*, Circuit Judges.

GOLDBOLD, Chief Judge:

This appeal arises from an illegal strike by employees of an airline subject to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Without seeking an injunction against the strike the carrier replaced some of the striking workers on the ground that this was necessary for it to continue operating. The airline then sought and obtained injunctive relief ending the strike, and those strikers not replaced were reinstated. The district court held that strikers who had been replaced because of necessity to continue operations were not entitled to reinstatement. It found that four strikers had been

* Honorable Harlington Wood, Jr., U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

replaced unnecessarily and ordered them reinstated but denied them backpay.

The union contends that the district court should have ordered reinstatement to their pre-strike jobs of all persons who had been replaced.

We hold the following. This was a minor dispute under the Act. The district court was not required to order reinstatement of all strikers. Rather it was within the court's equitable discretion to determine whether strikers who had been replaced should be given their jobs back. The district court acted within this discretion in deciding that it was necessary for the carrier to replace strikers in order to continue operations and that properly replaced strikers were not entitled to reinstatement. The district court acted within its authority in deciding on an individual basis which strikers it had been necessary for the carrier to replace; this issue was not as a matter of law reserved to the administrative procedures of the Railway Labor Act. Finally, on the issue of necessity to replace, we review the correctness of the court's findings with respect to individual strikers and also the relief granted those unnecessarily replaced.

I.

The facts of the strike, as found by the district court after extensive evidentiary hearings, are largely undisputed. Empresa Ecuatoriana de Aviacion is an international airline headquartered in Quito, Ecuador, with its primary American operations in Miami and New York. The Miami facility handles a modest amount of passenger and cargo business[1] and employs approximately 70 people. The workers are represented by the International Association of Machinists and Aerospace Workers, District Lodge No. 100. The collective bargaining agreement contains a no-strike clause.

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[1] Passenger flights arrive and depart 14 times per week, and three to five cargo flights come in and out per week.

The airline scheduled for April 9, 1979 computer training sessions for employees in the reservation department, and it planned to use the ticket counter computer in the training. During the first week in April union representatives complained, both orally and in a letter, that the airline intended to cross-utilize personnel from the ticket counter and reservation department during the training[2] in violation of the collective bargaining agreement. The letter, delivered April 4, also alleged that the airline had failed to process two grievances and had used management personnel to perform union employees' functions at the airline's New York facility. The union threatened to strike if the training session was held.

Counsel for the airline responded by letter on April 5, stating that the collective bargaining agreement specifically permitted such training sessions and reminding the union that it could invoke grievance machinery to settle this dispute. The letter also assured the union that there would be no cross-utilization of personnel.

The airline's counsel, Greene, planned to vacation in Scotland beginning April 8. He, therefore, drew up contingency plans for use in the event of a strike, one of which consisted of permanently replacing the number of strikers necessary to continue operations.[3] Greene advised the airline that if the strike materialized it should hire replacements, offering them permanent jobs.

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[2]The record is unclear whether the union feared cross-utilization would occur only during the training sessions or whether it suspected that the purpose of the training was to facilitate cross-utilization routinely.

[3]The distinction between permanent replacement and discharge is often meaningless, but speaking generally, a striking employee does not lose his job under the replacement concept unless and until the employer hires someone else to perform his functions. If the replacement quits before or soon after the strike ends, the replaced employee will be reinstated.

On April 6 the union held a meeting to discuss the upcoming training session. Cargo employees who were working overtime were permitted by the cargo manager to attend the meetings. Although union counsel advised the employees at the meeting that they could not strike legally, the chief shop steward disagreed and successfully urged the cargo workers not to return to work that night. The airline could not get other employees to fill in, so the cargo manager and friends completed unloading cargo.

April 8 the four station agents scheduled to work called in sick. Station agents check in passengers and their luggage, handle the boarding, and generally take care of the needs of the passengers and crew. Management had to service a departing passenger flight because of the agents' absence. Acts of sabotage were encountered: baggage cart tires were flat, a false announcement about the flight's delay was broadcast, harassing phone calls to the airline were received, and ticketing machines malfunctioned.

Later that day management met with union representatives, and it was agreed that there would be no strike the next day, the first day of training. Greene then left on his vacation.

On April 9 employees, including the chief shop steward, showed up for the training session. However, during lunch the steward and other employees urged workers to punch out sick by disseminating a false rumor that three cargo workers had just been fired. Most workers complied.

Although the union did not initiate the walkout it enthusiastically embraced the strike. It rented a hotel room to serve as strike headquarters, applied for picketing permits at the airport, sent a letter to the airline refusing to end the strike until the airline corrected the alleged collective bargaining agreement violations[4] and unsuccessfully

[4]The president of District 100 stated that he was afraid to tell the union members to go back to work and that, in a wildcat strike situation, the union normally undertakes negotiations

(footnote continued on next page)

encouraged union members in the New York facility to strike, too. At no time did the union tell the carrier when or if the strike would end. On April 9 the airline engaged new counsel, who shared office space with Greene, to begin drawing up a request for a temporary restraining order. The airline began hiring a combination of temporary and permanent replacements the evening of April 9 and continued this on April 10. On April 10 it sent a letter to striking employees telling them that they would be replaced. The same day the carrier fired employee Menoscal on the ground that she had incited other employees to engage in the strike. By April 11 all cargo employees had been replaced.

New workers and the few remaining employees performed under adverse conditions caused by the strikers' conduct.[5] Workers were threatened in person and on the phone with physical violence; one employee avoided assault only by displaying an unloaded gun; one worker's car was covered with acid and its windshield was broken; keys to the company vans, which transport the crew and food, were missing; obscene calls tied up telephone lines; and misinformation that the airline had ceased operations was distributed to travel agencies. These acts of harassment and vandalism caused several replacements to quit and most of the nonstriking employees to join the strike.

In the afternoon of April 11 the airline filed suit asking the court to enjoin the strike and order the employees to return to work. The court conducted an emergency hearing on the evening of April 12 and immediately entered a TRO enjoining the strike, ordering the employees to return to work for their next shifts, and enjoining the carrier from

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(footnote continued from preceding page)

with the company to secure the voluntary return of the members. The president also admitted that he had no intention of disciplining striking members.

[5] Management employees too put in long hours substituting for union employees.

failing to properly process grievances. After this hearing on April 12 the carrier stopped hiring replacements. Striking employees returned to work April 13. Those who had been replaced no longer had jobs. The union then petitioned for relief asking that the court restore the status quo as of the time before replacements were hired, by reinstating all strikers. The court did not grant this relief but scheduled hearings, beginning April 19, to determine whether replaced employees were entitled to reinstatement. The district court refers to 35 employees, and approximately 40% of the work force, as replaced. The union asserts (although it is unclear as of what time) that the percentage replaced was as high as 65%-70% of the work force. We need not resolve these differences in percentages because it is undisputed that a substantial part of the work force had been replaced by the time the carrier filed its suit and sought a TRO.

After several days of hearings the court held that the airline could replace strikers to the extent reasonably necessary to continue operations. It found that employing necessary replacements satisfied the airline's obligation under the Railway Labor Act to sustain operations without destroying the continuity of the employer-employee relationship, another goal of the Act. The court also held that, to protect the goal of employment continuity, it must pass on the necessity of each replacement and it determined that four replacements had been unnecessary. The court ordered that the four affected strikers be reinstated but declined to award them backpay, citing the illegality of the strike. The court considered backpay to be a type of unjust enrichment under the circumstances.

II.

The Railway Labor Act, as amended, groups disputes into two categories, major and minor,[6] and prescribes different procedures for their adjustment. The dichotomy between the

[6] Although the Act itself does not use the major/minor labels, the courts have found the terms expedient.

two categories is based upon differences in the nature of the disagreement, and the procedures applicable to each are adjusted to the nature of each. Conduct or misconduct of the parties, or the impact of misconduct of one party on the other, is not a distinguishing feature between the two channels of dispute resolution provided by the statute.

A major dispute pertains to intended changes in agreements affecting rates of pay, rules or working conditions. "[A major dispute] look[s] to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945). The Act provides for notice of an intended change and for maintaining the status quo until the adjustment procedures of the Act—conferences, mediation and intervention by a specially created emergency board—are carried out with respect to the proposal. When either carrier or employee desires to make changes in the agreement respecting pay, rules, or working conditions, it must give 30 days written notice, often called the § 6 notice, 45 U.S.C. § 156, and once notice has been given the employer cannot alter rates of pay, rules or working conditions until 30 days after all adjustment procedures have been exhausted. 45 U.S.C. §§ 155, 156,[7] 160. The employees are under a parallel obligation not to strike.

A minor dispute is not concerned with changes in terms and conditions already agreed upon—that is, eliminatin of an existing provision or substitution of a new provision or substitution of a new provision for an old one—rather a minor dispute concerns differences over what has previously been agreed upon. In a general sense, a major dispute is about a subject matter that in a non-statutory context would bring about collective bargaining, while a minor dispute involves employee grievances or differing interpretations or applications of the existing collective bargaining agreement. In this

[7] If neither party requests the services of the mediation board within 10 days after conferences have terminated, the parties are no longer required to maintain the status quo.

case the airline initiated a training session alleged to involve cross-utilization of personnel, it allegedly failed to process grievances, and it is alleged to have used management employees to perform tasks reserved for union employees. All of these are actions taken under, or perhaps contended to be in violation of, the collective bargaining agreement. This is a minor dispute.

The union seeks to bring itself within the major dispute provisions of the Act, contending that this is a major dispute because, first, it involved an effort by the airline to amend the bargaining agreement by adding a right to self-help, and, second, the company violated the status quo provisions of the Act, 45 U.S.C. § 152 Seventh, when it replaced workers. This effort to bootstrap a minor dispute over terms of the bargaining agreement into a major dispute involving proposed changes in the agreement must be rejected. The airline did not assert a right to replace strikers under the agreement, present or prospective, but under principles of self-help extrinsic to the agreement. Accepting the union's contention—that assertions by the airline of a managerial power not included within the bargaining agreement is an effort to amend the agreement to give management that power—would convert many minor disputes into major disputes and alter the basic dichotomy of the Act. As to the status quo provisions of the Act, the statutory freeze of § 152 Seventh flows out of a major dispute and after a § 6 notice has been given. It stands the statutory scheme on its head to assert this section as the basis for a major dispute where no § 6 notice has been given.

We turn then to consideration of this case with its nature as a minor dispute correctly recognized. First, we look at the policy of the Act. As is often stated, the purpose of the Act is to avoid interruption to commerce by providing dispute resolution machinery to prevent strikes. 45 U.S.C. § 151a; remarks of Rep. Barkley of Kentucky, Feb. 24, 1926, reprinted in Legislative History of the Railway Labor Act, As Amended, Subcommittee on Labor of the Senate Commit-

tee on Labor and Public Welfare (1974) at 215 ("Legislative History"); *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548, 568-69, 50 S.Ct. 427, 433, 74 L.Ed. 1034 (1929). Emphasis is laid on negotiation and voluntary settlement.

Despite the reluctance of Congress to compel the parties to settle disputes, it determined in 1934 that minor disputes should not be permitted to fester until strikes threatened. To this end, it provided for a national board of adjustment and compulsory arbitration.[8] The 1934 amendments to the Act indicate that Congress thought drastic resort to economic self-help was inappropriate to settle minor disputes.[9] A minor dispute must be submitted to compulsory arbitration by an adjustment board, 45 U.S.C. § 153,[10] which has exclusive jurisdiction to decide minor disputes. *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795 (1950). Employees are forbidden to strike over minor disputes, and the federal courts have jurisdiction to enjoin such strikes. *Brotherhood of Railway Trainmen* v. *Chicago R & I R Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). Thus, injunctive relief was available to the airline in this case. There is no statutory requirement that while a minor dispute is being arbitrated the status quo must be maintained; the carrier may act unilaterally until told to do otherwise by the adjustment board's decision. *Brotherhood of Loc. F & E* v. *Southern Pacific Pac. Co.*, 447 F.2d 1127 (5th Cir.

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[8] Congress found that since the Act's enactment the parties had failed to establish their own boards. Even when operating, the boards often failed to reach decisions because of equal representation by management and labor. Report of Senate Committee on Interstate Commerce on S.3266, May 10, 1934, Legislative History at 820–22.

[9] See remarks of Rep. Barkley, Feb. 24, 1926, reprinted in Legislative History at 211.

[10] The air transportation industry does not have a national adjustment board; the carriers and union have a duty to establish system, group or regional boards of adjustment. 45 U.S.C. §§ 184, 185.

1979). In this instance, in response to the union's use of self-help in violation of the Act, the airline acted unilaterally by hiring replacements, and then it repaired to the federal court for injunctive relief, which it obtained.

As an alternative to the contention, which we have rejected, that this was a major dispute, the union argues that although the specific language of the Act does not require maintenance of the status quo ante in a minor dispute, the policy of the Act does not require it. Thus, the union says, since the carrier could obtain injunctive relief that would require the union to restore the status quo by ceasing the strike, the policy of the Act precludes the carrier from employing the self-help of replacement until it has exhausted the injunction route. And, to the extent that the carrier employed replacements before obtaining injunctive relief, all strikers were entitled to return to work in their former jobs.

There are many opposing tensions in this case. The Act does look to settlement of minor disputes by arbitration, and it embraces a strong policy of continuance of employer-employee relationships, although it does not specifically require that the status quo be maintained in a minor dispute. The union has a duty not to strike. The carrier is obligated to supply public transportation and to that end may have to employ replacements to keep service going. The policy of the Act is for negotiation and settlement, as opposed to retaliatory, and often escalating, exercises of economic warfare. The union was subject to injunctive relief that would put the dispute back on the track that Congress had provided and subject also to a possible damage award for violation of the collective bargaining agreement.

There is no contention that the district court erred in enjoining the strike and ordering employees back to work. We cannot say that the court misused the equitable discretion that it possesses in an injunction case by declining to oust all replacements and to order that all strikers have their pre-strike jobs back. The court carefully considered and

balanced the competing interests. It held that the carrier was justified in replacing employees as needed in order to continue to meet its cargo and passenger flight schedules, perform its necessary internal business functions, and avoid losing customers and revenue to competitors. It found that the carrier struck a proper balance between its twin obligations to serve the public and to attempt reasonably to maintain the employer-employee relationship.

Several factors support the court's decision. The airline did not carry out a mass, punitive discharge the moment the strike began. It sought to operate with supervisory employees and their friends, who worked long hours. It hired replacements as and when needed for the tasks at hand. It attempted to persuade some strikers to report to work. Also the carrier acted with reasonable dispatch in seeking injunctive relief; there is no basis for any inference that it delayed going to court in order to get rid of strikers. When the strike was ended by the TRO, strikers who had not been replaced were reinstated, no one was denied reinstatement because of misconduct,[11] strikers replaced were told that if their replacements left or other positions opened up they would be recalled, and pursuant to this promise several strikers were reinstated after April 13.

Several matters, however, deserve comment. First, the district court did not, and we do not, lay down a per se rule that any time a minor dispute is in progress and the union strikes, the carrier may replace strikers before seeking injuctive relief. Rather, in the circumstances of this case, the trial court, in the exercise of its equitable power, required the reinstatement of strikers unnecessarily replaced and declined to require reinstatement of those necessarily replaced, and we find both rulings within its discretion.

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[11] One employee, Menoscal, was discharged for inciting others to strike in violation of the bargaining agreement. This is the subject of an arbitration proceeding.

Second, the district court considered that the union had behaved badly by availing itself of illegal self-help, and we agree. But we do not, however, base our decision on a concept that the employer was entitled to retaliate because the union threw the first stone, or that the district court should punish the union for bad conduct. Nor do we rely on notions of unclean hands, estoppel or waiver. The central concern of a court must be to weigh the policy of the Act, which is to keep the employer-employee relationship intact, against the policy of the carrier's being able to continue to furnish transportation service by replacing employees to the extent necessary and until the authority of the court can be brought to bear. We cannot say that in analyzing this concern the district court could not, in its discretion, come down as it did.

Third, *National Airlines, Inc. v. International Association of Machinists and Aerospace Workers,* 416 F.2d 998 (5th Cir. 1969), ("National Airlines I"), and *Railway Employees* v. *Florida East Coast R. Co.,* 384 U.S. 238, 245, 86 S.Ct. 1420, 1423, 16 L.Ed.2d 501 (1966), are not controlling of this case. The district court relied upon these cases as the basis for the carrier's right to replace strikers. Though we have sustained a right to replace, it is for different reasons. *National Airlines I* involved a major dispute in which strikers had been enjoined and had refused to obey the injunction. There had been a proper resort to the courts to get the dispute back on the track but without avail. The court held it was not necessary to reinstate strikers who had been replaced. In the present case the right to replace is not drawn from the status quo provisions of the Act, for there are none with respect to minor disputes, nor from the flouting of a court order, which did not occur here, but from the court, in the circumstances of the case, balancing the underlying policy of the Act against the policy of continued carrier service. For the same reasons we reject the union's theory that *National Airline I* stands for the proposition that a carrier may never replace a striker until it has exhausted possibilities of injunctive relief (and possibly even until strikers have disobeyed a court order). *Florida East Coast* also was concerned with a major

dispute where, under the statutory scheme, the status quo had been maintained until 30 days after adjustment procedures had been exhausted. The parties then were entitled to avail themselves of self-help. The ameliorative purposes of the Act had been vindicated, though without success. The union thereupon resorted to a strike that could not be enjoined and the end of which was impossible to predict. For the same reasons as *National Airline I,* this case does not control the right to replace in the instant case nor support the union's argument that there could be no replacement until injunctive efforts have been exhausted.

III.

Having concluded that the carrier could replace strikers where necessary to its operation, we turn to consideration of the proprietary of the individual replacements. Both parties dispute the district court's authority to examine the propriety of each individual replacement. The union argues that if the act of replacement constitutes a minor dispute, the system board of adjustment had exclusive jurisdiction to determine the validity of each replacement, so that each replaced striker should have been permitted to arbitrate the issue of his or her replacement. But the district court's ability to determine the issues of reinstatement and backpay is inherent in its power to issue injunctive relieve. Unquestionably the adjustment board has exclusive jurisdiction to decide the underlying minor dispute about cross-utilization of personnel. But when the parties jump the track and one side seeks injunctive relief, the district court may, in its discretion, decide all corollary issues concerning the status quo. *Brotherhood of Locomotive Engrs.* v. *Missouri-Kansas Texas R. R.,* 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1435 (1960). *See United Industrial Workers of Seafarers Int'l Union* v. *Bd. of Trustees of Galveston Wharves,* 400 F.2d 320, 324-27 (5th Cir. 1968) for a similar discussion of the court's authority to decide reinstatement and backpay issues in a major dispute case.

The airline contends that once the district court confirmed the company's right to replace and found that the airline had acted without union animus, the court exceeded its authority by testing the necessity of each replacement; instead the court should have deferred to the business judgment of the airline managers who made quick decisions under duress on which replacements were necessary to continue operations. We have recognized that, under the circumstances, the employer could balance the necessity of remaining operational against the policy of maintaining employment relationships, but this does not mean that its decisions are beyond judicial review.

The district court's meticulous fact finding of the conditions surrounding each replacement insured preservation of the delicate balance between the two goals of the Act, continuity of the employer-employee relationship and uninterrupted service. The court did not abuse its discretion by scrutinizing each replacement. *National Airlines, Inc.* v. *Int'l Assn. of Machinists and Aerospace Workers,* 430 F.2d 957 (5th Cir. 1970) ("National Airlines II") does not dictate a contrary holding.[12]

We have reviewed under the clearly erroneous standard the district court's findings concerning the necessity of each replacement. We find no clear error in the findings with respect to any employee whose replacement was held to be

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[12] On remand from *National Airlines I,* the district court determined that it had been reasonably necessary for the airline to discharge all strikers in order to continue operations. In *National Airlines II* we reiterated our previous holding that replacement was the outer limit of persmissible self-help and that all strikers who had not been replaced by the time the strike would have ended but for the discharges were entitled to reinstatement. We directed the district court to determine who had been replaced as of that date and to reinstate the rest. The district judge in *National Airlines* had found it unnecessary to closely examine each replacement because he thought the mass discharge was sustainable.

necessary. Four strikers, Sosa, Ferrer, Montessinos and Rodriguez, were held unnecessarily replaced. Sosa, Ferrer and Montessinos were offered reinstatement; Montessinos accepted, and the other two refused. The claims of these three for reinstatement are thus moot, and the airline has eschewed review of the necessity-of-replacement issue with respect to them.

Rodriguez worked in the sales office as one of two sales representatives. He and employee Baca divided territory geographically and each was responsible for half of the total. When the strike began false information was disseminated that the airline was cancelling all flights, and sales representatives' most important duty became to contact travel agents and answer phones to assure customers that the airline was still operating.

Rodriguez joined the strike on Monday. On Tuesday afternoon management decided that he should be replaced. A potential replacement was interviewed either that afternoon or the next day and was put to work on Wednesday. Meanwhile Baca, the second sales representative, received a telephone call Tuesday afternoon in which the caller threatened him with physical harm. Because Baca was elderly and nervous management permitted him to go home a few minutes early. Management did not know that he would not return to work. However, on Wednesday Baca did not come in for work; instead he joined the strike. Thus, Rodriguez's replacement was authorized by management because it thought two employees were needed in the sales office. Hiring of the replacement was unrelated to Baca's joining the strike. The district court found that the airline could have operated the sales office with one person, so that is was not reasonably necessary to replace Rodriguez. We cannot say that this determination is plainly erroneous.

The district court declined to award backpay to any striker who had been unnecessarily replaced on the ground that this would unjustly enrich him. We hold this was error. We have already discussed the court's equitable discretion and the

balancing of interests. Once these processes were exhausted and it was determined that there were persons who had been unnecessarily replaced and therefore were entitled to reinstatement, these persons were also entitled to the remedies that normally accompany reinstatement. Backpay is not intended as punishment for the carrier or a windfall to the employees but is "the price of reconstructing the status quo." *United Industrial Workers of the Seafarers Int'l Union* v. *Bd. of Trustees of Galveston Wharves*, 400 F.2d 320, 325 (5th Cir. 1968). Nor should backpay be denied as a means of disciplining erring strikers. In *National Airlines II* we held that wildcat strikers who had been fired while freeze provisions of the Act were in effect were entitled to reinstatement with full benefits including backpay. The wrong of the strikers was not indicated to be a bar, and in ordering a remedy we did not engage in a new balancing of striker misconduct versus employer misconduct. Again, a court must keep central to its consideration the national policies underlying the Railway Labor Act and not individual feelings of judges about who has and who has not behaved badly. Thus, Rodriguez is entitled to reinstatement with backpay and other benefits from the date he came off strike to the date he is offered reinstatement, reduced by any earnings during the period for which he is entitled to backpay. Sosa, Ferrer and Montessinos are entitled to backpay and other benefits from the date each came off strike to the date the airline offered to reinstate him or her, reduced by any earnings during the backpay period.

The district court did not address the union's request for a preferential hiring list of those necessarily replaced but entitled to reinstatement when vacancies occur. The strikers who were properly replaced are entitled to be placed on such a list, to be rehired when their replacements quit or when a similar vacancy arises. Without this hiring preference the concept of replacement becomes indistinguishable from discharge. The district court should work out the details of the preferential hiring list, including the duration of the list, if the parties cannot agree among themselves.

In the union's appeal, we REVERSE on the issue of the entitlement of unnecessarily replaced strikers to backpay and the requirement of a preferential hiring list and AFFIRM on all other issues; on the airline's cross-appeal we AFFIRM on all issues. The case is REMANDED for further proceedings.

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 80-5349

EMPRESA ECUATORIANA DE AVIACION, S.A.,

Plaintiff-Appellee, and Cross Appellant.

versus

DISTRICT LODGE NO. 100, Et. Al.,

Defendant-Appellant, and Cross Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 1, 1982, 11 Cir., 1982, ____F.2d 318).

(DEC 30 1982)

Before **GODBOLD**, Chief Judge, **RONEY** and **WOOD**,* Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN C. GODBOLD
Chief Judge

IN THE

United States District Court

SOUTHERN DISTRICT OF FLORIDA

EMPRESA ECUATORIANA de AVIACION, *Plaintiff,* vs. DISTRICT LODGE NO. 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, J.G. CATES, AND JULIANA MENOSCAL, *Defendants.*	CASE NO. 79-1795-Civ-WMH

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to trial based on Complaint of the Plaintiff, Empresa Ecuatoriana de Aviacion (herein called Ecuatoriana) seeking injunctive and declaratory relief and specific performance of the no-strike provisions of the collective bargaining agreement between Ecuatoriana and Defendant, District Lodge No. 100, International Association of Machinists and Aerospace Workers (herein IAM). Defendants filed their Answer, denying that the alleged conduct by members of the craft and class represented by the IAM, or that the alleged conduct by union officials or stewards constituted an illegal work stoppage or strike in violation of the collective bargaining agreement and the Railway Labor Act. Defendants also denied that Ecuatoriana was entitled to the injunctive relief prayed for. The IAM filed a counterclaim alleging that Ecuatoriana was delaying the processing of grievance-arbitrations and was unilaterally changing working conditions, hours of employment and rates of pay in other than the grievance-arbitration procedure. IAM sought a Temporary Restraining Order seeking to restrain Ecuatoriana from violations of the collective bargaining agreement and the Act, and from replacing or

discharging employees, disciplining them or eliminating any jobs of employees.

Ecuatoriana's Complaint was filed on April 11, 1979 and IAM's Answer and counterclaim was filed on April 12, 1979. The Court held an emergency hearing on the evening of April 12. On that day the Court issued a Temporary Restraining Order enjoining defendants from instructing, indulging or permitting its members or Ecuatoriana's employees from engaging in work stoppages, strikes, failures and refusals to report to work or to perform services, failing to submit to the grievance arbitration procedures any minor disputes, and from engaging in striking activities or other concerted work stoppages. Ecuatoriana was enjoined from willful violations of the Act and the collective bargaining agreement, particularly by unreasonable delay in processing grievances or arbitration, and from taking any further disciplinary action against its employees from that day forward, or from thereafter replacing any employees because of actions taken by the employees prior thereto, provided the employees returned to work on their next regularly scheduled shift.

Thereafter on April 14 and 18, and May 18, further arguments were heard, and evidenciary hearings were held on June 15 and 22, July 13, October 15 and 16, and December 10 and 11, 1979.

Based on the foregoing, the credited evidence presented before the Court, the pleadings, statements and argument of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Summary: This is a case wherein craft-and-class members, following a refusal to abide by promises made to work overtime to prepare a cargo aircraft for departure, and a "sick-out" of an entire shift necessary to dispatch a departing passenger plane two days later, engaged in a strike in viola-

tion of the collective Bargaining agreement and the provisions of the Railway Labor Act. They did so against the express advice of the union's counsel and despite the promise of union representatives to management there would be no strike. After the strike began, the union took no disciplinary action against the employees, a permit for them to picket, provided them with a meeting place, encouraged them in their activities, and declined to order them back to work.

The strike largely took the form of "sick-out". The union admitted such activities were a "plan of action" which the union had used successfully in the past. At no time did the union or its members advise the carrier as to when or if the strike would end. The carrier, amidst some harrassment and vandalism, began hiring replacements, ultimately replacing approximately 40% of its 70-employee staff. None of the strikers was discharged, with the exception of the Chief Shop Steward/Airport Supervisor, discharged for inciting the other employees to engage in an unlawful strike, her discharge being the subject of a separate pending arbitration.

General Matters:

2. The parties agree that the Court must pass on, or if necessary, fashion remedies here, and that the collective bargaining agreement does not mention, and has no procedure concerning, striker replacements. (TR 4/18/79; p. 12)

3. The defendants admit there was a strike or work stoppage, and that it was unauthorized. (TR 6/15/79; p. 5)

4. Admittedly, there was no real issue as to whether the employees were in fact sick; there was no question but that the sickness was a pretense, with possibly one or two exceptions. (TR 6/15/79; p. 212)

5. Admittedly, the Chief Shop Steward is properly described as "the head of the union in the first line," and that ordinarily a "shop steward is an agent of the union" (TR 6/12/79; p. 23).

6. Juliana Menoscal was at times material, the Chief Shop Steward at Ecuatoriana. (TR 6/15/79; p. 30)

7. Although the IAM admitted that "the employer may discharge under collective bargaining agreement any person he knows, he has proof of as to leading it on," nevertheless, Ecuatoriana discharged none of the strikers, except for the Chief Shop Steward, who was discharged, inter alia, for inciting the other employees to engage in an unauthorized and illegal work stoppage. All the other strikers were instead either replaced or returned to work at the end of the strike.

8. Ecuatoriana flies various passenger routes throughout the United States, the Bahamas and Central and South America. The airline passenger schedule is as follows: Sunday: Flight 71 leaves Miami at 9:00 a.m. and Flight 72 arrives at 7:15 p.m. Monday: Flight 71 leaves at 9:00 a.m. Tuesday: Flight 54 arrives at Miami at 5:15 p.m. and leaves at 6:15 p.m. Wednesday: Flight 51 arrives in Miami at 2:30 a.m. and leaves at 3:30 a.m.; Flight 74 arrives in Miami at 10:15 p.m. Thursday: Flight 73 leaves Miami at 1:00 a.m. and Flight 72 arrives in Miami at 11:30 p.m. Thursday. Friday; Flight 71 leaves Miami at 2:30 a.m. Fridays and Flight 72 arrives in Miami at 6:15 p.m. Saturday: Flight 73 leaves Miami at 2:30 a.m. and Flight 74 arrives in Miami at 6:45 p.m. The process is then repeated with Flight 71 leaving Sunday morning at 9:00 a.m. (PLF. EX. 1)

Cargo flights come in and out of Miami from three to five times per week, depending on the volume of cargo.

In the period of-time before April 9, 1979, Ecuatoriana employed, at the Miami operations, approximately 70 employees.

The Computer Training and the Strike Threats:

9. The airport ticket counter utilizes a computer of the same type used by the Reservations Department, and Ecuatoriana scheduled training for airport employees on the computers; (TR 6/15/79 p. 29) Menoscal was one of the three

employees chosen to attend the first training class. She was notified on March 30, 1979, to begin training at 9:00 a.m. on April 9, 1979. (PLF. EX. 3)

10. On March 30, 1979, in a discussion with a New York employee, Menoscal stated that "we" were having problems in Miami and "if we don't get a satisfactory answer, we're going to stop the company." (TR 6/15/79; p. 123)

11. Sometime during the week of April 2, Elvia Ferrer, secretary of Ecuatoriana's General Manager Nardi, approached one of the Reservations agents, Lourdes Lyon, a former Shop Steward, at a coffee break and said to Lyon that the employees were having problems with the company's hiring people as management and using them to do work and that maybe the only way to solve that would be to walk out. Lyon protested that the employees could file a grievance instead. (TR 6/15/79; p. 173–4)

12. Around April 2nd or 3rd, Nardi met with Menoscal and Warren Baum, one of the union's executives. The union representatives asked if there were going to be cross utilization of personnel in the training; Nardi assured them there was not. (TR 6/15/79; p. 30)

13. Nevertheless, at about the same time, in a telephone conversation, Bam told Nardi that if the training took place on April 9, "they would close down the shop."

14. On April 4, there was hand delivered to Nardi a letter from Baum* complaining of unspecified alleged failures on the part of the carrier to abide by and respect employees' rights under the collective bargaining agreement. The letter listed other complaints and finally claimed that the carrier intended to cross utilize work from ticket agents to reservations and vice-versa. *(PLF. EX. 3A)

The letter continued that inasmuch as the members did not chose to tolerate the situation any longer, the union would consider the carrier's action to be a lockout.

15. The carrier immediately instructed its labor counsel, Greene, to respond to the union's letter, and Greene did so on April 5.* The April 5 letter reminded the union of the machinery available for settling disputes under the collective bargaining agreement and the Act, and attempted to answer the allegations in the union's letter by assuring the union that the carrier was not threatening any employee with discharge for failure to permit cross utilization of work efforts, assuring the union that the carrier did not intend to require individuals to change their working conditions on April 9, and further assuring the union that the carrier did not intend to engage in any illegal self help or a lockout. *(PLF. EX. 4)

The letter continued that all the carrier intended to do was simply require the employees to attend a company training program, and called attention to the articles of the collective bargaining agreement which permitted such training programs. The letter also called the union's attention to the no-strike, no-lockout provisions of the agreement. Finally, the carrier pointed out to the union that if the threatened stoppage did occur on Monday, the carrier would have no alternative but to take the steps available to it under the contract and the statute.

In court, defendants admitted that the carrier's April 5 response was "very accurate." (TR 6/15/79; p. 22)

16. Based on Baum's April 4 letter and the oral strike threats, several of the carrier's officers, management representatives and managers met with Greene later in the week. Greene told them of the strike threats, read them Baum's letter and explained the significance of these events to them. He told them what could happen in the event there was a strike.

He stated that the strike action, if it occurred, might take one or more of several courses, including a slow down, intermittent or "'quickie" strikes, a formal strike, or a "sick-out," and that they must be prepared for any of these

eventualities. (TR 6/15/79; p. 33; TR 10/15/79; p. 76–77; TR 6/26/79; p. 102–3)

Greene instructed the managers that, inasmuch as management did not know which event might occur as a result of the threats, he would draft forms for each of the eventualities and leave them with Administration. (TR 10/15/79; p. 77)

He further instructed them that if the strike did occur, the carrier was under an obligation to continue to give good service to the public and that was the main concern. He stated that they were to try as much as possible to observe the terms of the collective bargaining agreement, but if forced to choose between the two things, they would have to give preference to service to the public during the strike. (TR 10/15/79; p. 12)

He told them that if the threats materialized, they must not discharge the strikers, but must instead hire replacements in order to continue service to the public. He said the replacements should be offered permanent jobs. (TR 6/15/79; p. 33; p. 309; TR 6/26/79; p. 104; p. 153)

Finally, Greene told them that he and management representatives were going to meet with union representatives to attempt to avert the strike. (TR 6/15/79; p. 309)

17. Drafts of various documents to be used in the event the threatened work stoppage did occur, were made up thereafter by Greene, probably around April 5 or 6, but in any event before the April 8 meeting (described below) at which Ecuatoriana received the union's promise there would be no strike. (TR 6/15/79; pp. 59, 112)

18. Greene had made plans to leave on April 8 for Scotland, where he would be unavailable to Ecuatoriana. Accordingly, Reservations Manager Almeyda was attempting to handle alternate reservations for Greene, because in the event there were no settlement of the strike threat,

Greene would have to change his plans. (TR 6/15/79; p. 59; TR 10/15/79; p. 13)

The April 6 Events at Cargo:

19. On Friday, April 6, a cargo airplane was waiting to be worked on; the Cargo Department had not finished palletizing, customs work, nor documentation for the flight, which was scheduled to depart the next day. (TR 6/15/79; pp. 204, 253–254)

20. The union however, had scheduled a meeting for 5:00 o'clock that evening to discuss the April 9 training session. The cargo employees asked that they be allowed to attend the meeting, and promised that they would return after the meeting to finish work on the waiting aircraft. (TR 6/15/79; pp. 34, 204, 251)

21. Although under the terms of the collective bargaining agreement, the cargo handlers shift ends at 5:00 p.m., the usual practice is for them to remain, on overtime, to complete the work on a flight which is in. (TR 5/15/79; p. 251)

22. After the union meeting, the Cargo employees did not return to work on the flight. (TR. 6/15/79; pp. 34, 204)

23. Although there is no contractual requirement that the employees must accept offered overtime, the practice is such that when the employees timely decline overtime, management can then go to the street to hire people to finish the job. However, by virtue of the employees promising to come in but failing to do so, the management was precluded from preparing for the eventuality. (TR 6/15/79; p. 205)

It was a tactic which was to be repeated on a larger scale on the following Sunday and Monday.

Moreover, the employees did not notify the Cargo Department that they had changed their minds and were not coming back after the union meeting. The Personnel Manager and the Cargo Manager began calling the employees late Friday night and every employee contacted claimed to be

sick, or that a family member was sick or that they could not come in. Each of them refused to come in. (TR 6/15/79; p. 206)

As a result, the Cargo Manager had to call in friends and relatives to work the flight. The airplane eventually went out twelve hours late, on Saturday night or early Sunday morning. (TR 6/15/79; pp. 34, 206)

On Friday and Saturday, the Cargo Manager worked about twelve hours each day. (TR 6/15/79; p. 207)

The April 6 Union Meeting

24. At the union meeting held on Friday, April 6, most or all of the Ecuatoriana employees were present, along with Chief Shop Steward Menoscal and Messrs. Baum and Manners. At the meeting an argument ensued as to whether or not the employees were to receive the training scheduled for Monday, April 9. (TR 6/26/79)

Mr. Manners' position was that the employees should receive the training; Mrs. Menoscal disagreed with him. She stated that the employees should not receive training because it was not in the collective bargaining agreement. (TR 6/26/79; p. 27)

Mr. Manners said he wanted to know why, if management was so bad as claimed, the employees had had only 42 grievances filed.* The only two arbitration matters of which union counsel was ever aware of was the old, resolved, Recuset arbitration and the then-pending Davalos arbitration. (TR 6/26/79; pp. 94–5) *(TR 6/15/79; pp. 175–6)

Manners explained that the way to solve the problem would be to file a grievance, that if the employees walked out it would be illegal, and he did not recommend that they do it. (TR 6/15/79; pp. 175–6)

He told the members to "cool it," that everything seems to be proper according to the collective bargaining agreement,

and the employees were instructed to start their training. (TR 6/15/79; p. 22)

While he was speaking, Mrs. Menoscal was making faces, comments such as "you know he's crazy," and acting in such a manner as to indicate to the employees that they should disregard what Manners was saying. (TR 6/15/79; pp. 175–6)

Her reaction as far as could be seen by those in the audience was that she did not like what Mr. Manners was saying. Moreover, Menoscal urged the Cargo employees not to return to work; this upset Mr. Manners because he had promised the management that the people would go back, but Menoscal insisted that they not go back, and they did not do so. *(TR 6/15/79; p. 28; TR 6/15/79 p. 177)

At the meeting, employee Jose Yedo stated that he was going to beat up Oquendo, the Personnel Manager; he told the employees they should not be afraid of doing anything because they can get together and "beat the guy up." (TR 6/15/79; pp. 177–8)

At the end of the meeting, Menoscal agreed to go to the training on Monday morning, but stated that they would then decide what they were going to do. (TR 6/26/79; p. 28)

After the formal meeting was over, Mrs. Menoscal went from one group to another speaking with the employees. (TR 6/15/79; p. 178)

The Sunday, April 8 "Sick-Out":

25. On Sunday, April 8, passenger Flight 71 was scheduled to leave at 9:00 a.m. The aircraft was full. (TR 6/15/79; p. 35)

Ordinarily, five station agents were supposed to report in to handle that flight. On that day, one agent had permission to be off. Thus, the shift that day consisted of four employees; Yedo, Felipe DelRio, Andres Estrada, and Adriano Garcia. (TR 6/26/79; p. 37; TR 6/15/79; p. 34; PLF. EX. 53–56)

None of the four showed up, each calling in stating that they were sick. This left the airport with no employees to handle the flight.

Accordingly, the General Manager and various managers went to the airport to take care of the flight. (TR 6/5/79; pp. 35, 64, 20) (TR 6/26/79; p. 38) (TR 10/15/79; p. 111)

The managers encountered various problems in attempting to prepare the flight for departure. First, there was a false announcement made over the public address system that the flight was going to have a two hour delay. The managers, in order to avoid the passengers' leaving when the airplane was in fact ready to depart, had to catch the passengers and advise them that this was not true. (TR 6/15/79; p. 62) (TR 6/26/79; p. 38)

Secondly, the telephone lines were tied up by a great number of telephone calls in which the caller would say nothing when the phone was answered or would make obscene remarks. (TR 6/26/79; p. 39)

Third, during the preceding week the airport counter began experiencing difficulties, including the disconnecting of internal parts of machines being used and the physical removal of the mouthpieces from the telephones. (TR 6/26/79; p. 43)

The malfunctioning of the machines affected the ability to handle the flight on Sunday, and the manifests had to be filled out by hand. (TR 6/26/79; p. 43)

Finally, tires were flattened on two baggage carts. (TR 6/15/79; p. 35)

The managers got the plane out, and on the next Monday afternoon, telegrams were sent to the four employees who had failed to report for work for the flight. The telegram was a reprimand for violation of certain provisions of the collective bargaining agreement and the company rules and regulations. A copy was sent to the union. (TR 10/15/79; p. 112; PLF. EX. 52–56)

The April 8 Settlement Agreement:

26. At mid-day on Sunday, April 8, General Banderas, the carrier's President, and Messrs. Nardi and Greene met with union representative Baum and union counsel Manners. This was an off-the-record discussion, concerning, inter alia, the training and the problems relating to the possibility of a strike. At the end of the meeting, there was agreement that there would be no strike on Monday, April 9. (6/15/79; p. 36)

The managers were informed of the agreement on Sunday evening and were told there would be no strike on Monday.*

As a result of the agreement, Greene left on a two-week vacation to Scotland, and was thus unavailable for that period of time. *(TR 6/15/79; p. 309; TR 6/26/79; p. 158; TR 10/15/79 p. 13)

The Strike on April 9;

On Monday, April 9, at 9:00 a.m., Menoscal and Airport employees Recuset and Davalos began their training session as scheduled. (TR 10/15/79; p. 12)

At about 10:00 a.m., Mrs. Ferrer again spoke with Mrs. Lyon, telling her that the Vice President of the union had called her and told her that employees should walk out at 12 o'clock claiming they were sick. Mrs. Ferrer cautioned Lyon not to say anything: (TR 6/15/79; pp. 179–180)

In mid-morning, Ferrer knocked on the door of the Reservations Department office, where the training session was being held. She stated that there was a message for Mrs. Menoscal to call Mr. Cates as soon as possible, (TR 10/15/79; p. 14–15)

Mrs. Menoscal asked if she could go out, and Almeyda noted that it was 10:15 and stated the employees could take a 10 or 15 minute coffee break. In fact, Mrs. Menoscal did not come back for 45 minutes. When she came back, along with Messrs. Davalos and Recuset, she was nervous, pale and whispering to the other two. She kept checking her watch every few minutes. *(TR 10/15/79; p. 15)

Almeyda stated to the three that if it was convenient with them, he would like to have lunch about 1:00 o'clock, Menoscal objected, stating that "it has to be at 12:00."

Almeyda agreed, but said that inasmuch as he had to have lunch at 1:00, they could have a two hour lunch break, and should come back at 2:00 p.m. (TR 10/15/79; p. 16)

The training continued until a few minutes before 12:00, when Menoscal stated she had to leave. Almeyda agreed and left the training room to go to the bathroom. (TR 10/15/79; p. 16–17)

Menoscal thereupon got up, looked out the window, walked with Ferrer into the Reservations Department and instructed the employees to punch their time cards out, and write "sick' on them, because they were leaving. She stated there had been three people fired in Cargo.

These statements were repeated by Mrs. Ferrer and another employee, Figueres. (TR 6/15/79; pp. 180–181)

Some of the employees began punching out their cards and writing "sick" on them. (TR 6/15/79; p. 181)

Mrs. Lyon forthwith called Cargo and ascertained that no one had been fired. She then attempted to call Mr. Manners' office but could not get through. Thereupon, Davalos called District 100's office and handed the phone to Lyon. Lyon discovered that Frank Rodriguez, a sales representative later appointed Chief Shop Steward, was on the District 100 phone. (TR 6/15/79; p. 182; TR 10/15/79; p. 22–23)

Lyon asked Rodriguez why the employees should walk out, and Rodriguez referred to the three people in Cargo. Lyon declared that this was not true, that they had just talked to Cargo. Lyon then asked to speak with Baum.

Lyon asked Baum what was going on, and Baum stated that Mrs. Menoscal had said that three people had been fired in Cargo. Lyon pointed out to him that that was not true,

(TR 10/15/79; p. 22–23) that she had just called Cargo and found that it was not true.

Lyon asked Baum to come over and explain the situation to the employees because some of them did not think they could just walk out.

Baum replied: "Well, I cannot tell you either to go out or not to go out, but maybe you should follow the majority of the people." (TR 6/15/79; pp. 182–183)

Baum then read to her a letter which J.G. Cates, President and General Chairman of District 100, was sending to Ecuatoriana. The letter, inter alia, referred to the use of "sick leave" by employees, referred to the training sessions which had begun that day as being "forced upon certain classifications and continued:

> "Therefore, by copy hereof , your attorney, Mr. Green, is advised that you are hereby notified that District Lodge 100, IAMAW, will not be responsible for actions our members may take as a result of your cavalier attitude toward them and the collective bargaining agreement. The sole responsibility for correcting these violations lies within your own hands.
>
> "As President and General Chairman of District 100, I strongly suggest you immediately evidence your willingness to correct them." (PLF. EX. 6; TR 6/15/79; p. 184)

Baum promised to come over to Reservations and bring the letter, but he never showed up. (TR 6/15/79; pp. 184–185)

When Almeyda returned to his office, he noticed through the window that Mrs. Menoscal was in the back of the Reservations office speaking to the employees. When she saw Almeyda looking at her she left through the back door. (TR 10/15/79; pp. 16–17)

Almeyda walked into the Reservations room and was met by general confusion.

Some of the employees were looking at the collective bargaining agreement, another was attempting to speak with Baum; still others were leaving, punching out their cards. Almeyda noticed four of his employees marking their cards "sick"; the employees were laughing. One employee, a Mrs. Webb, came back through the door and told him she forgot to put "sick" on her card. She took the card, wrote "sick" on it and put it back in the rack. She was laughing as she left. (TR 10/15/79; pp. 18–19)

Menoscal then went down the hall, where other employees were working, telling everybody to punch their cards and sign them "sick", and leave. The employees began taking their things, closing their offices and leaving. (TR 6/26/79; p. 4)

Menoscal continued, calling out in a loud-voice that everyone should go out, take their cards and write "sick" on them. She then repeated herself, ordering that everyone should go out, go home and stay there until further notice. (TR 6/26/79; pp. 9, 18)

The other two trainees, Recuset and Davalos, left with Menoscal and the other strikers. (TR 6/26/79; p. 19; TR 10/15/79; p. 21)

Thus, consistent with the position taken by her during the April 6 meeting, Menoscal led several of the employees out on strike and attempted unsuccessfully to lead several more out. (TR 10/15/79; p. 21)

In the meantime, one of the Reservations agents, Mrs. Suarez, called Mr. Manners' office and got through to the secretary, who told her that Mr. Manners was busy on another call; Mrs. Suarez held until the secretary suggested that she call Mr. Baum, with whom Lyon had already spoken (TR 6/26/79; pp. 5–6)

None of the employees who marked out sick came back, nor did the employees who had been in the training session. (TR 6/26/79; p. 19; TR 10/15/79; p. 21)

The Cargo Department on April 9:

28. On Monday, a cargo aircraft was scheduled in. In the morning the cargo employees were present and working, (TR 6/15/79; p. 207)

As usual, they prepared pallets and manifests, separated cargo and put it on the pallets in the proper order, because the airplane was scheduled to go out again early the next day. (TR 6/15/79; p. 208)

Included in the cargo on board the incoming airplane on Monday there were about one thousand pounds of frozen shrimp. (TR 6/15/79; p. 209)

One of the cargo employees, Banchon, went to the Customs, picked up the necessary documentation and obtained a log number. Ordinarily, after Banchon cleared the airplane through customs, it was to be brought over to Cargo for the other work to begin on it. (TR 6/15/79; p. 210)

However, between 12:05 and 12:13 p.m., all of the cargo employees punched out, and each marked their cards "sick" (PLF. EX. 25)

They then sat around waiting for Banchon, and when Banchon appeared, he marked his card "sick" at 12:16 p.m. (TR 6/15/79; pp. 210, 257)

There were thus no regular cargo employees left to work on the waiting airplane.

The Airport on April 9:

29. On Monday, five or six airport employees were working. At noon, all of them left together, punching out "sick." (TR 6/26/79; p. 44)

The next airport employees were scheduled to come in at 2:00 p.m., and then the final shift was scheduled to come in at 4:00 p.m. that day. None of them showed up. (TR 6/26/79; p. 45)

In like manner, the other employees working at the airport—Fleet Service and Operations—either left or failed to report for work. (TR 6/26/79; pp. 47, 50, 52)

The Downtown Offices on April 9:

30. In Sales, Frank Rodriguez did not report in to work at all on Monday; at noon he called in, claiming to be sick. (TR 10/15/79; pp. 113–114)

The other Sales Representative, Baca, continued to work on Monday. (TR 10/15/79; p. 113)

31. Accountant Assistants Moscoso and Cougil left work. (TR 10/15/79; p. 131; PLF. EX. 67)

Accountant Assistant Sosa was supposed to report in for work at 9:00 a.m. Monday; she did not. Instead, she called Finance Manager Guerra and told him that on instructions from her co-workers, she was not going to come into work. (TR 12/10/79; p. 37)

32. At the City Ticket Office, employees Barrundia and Marta Pirez left at 12:00 noon, claiming to be sick. (TR 10/15/79; pp. 129–130; PLF. EX. 66)

The Administrative Office on April 9:

33. With the exception of a few Reservations agents, all the employees in the building housing Reservations, the Administrative offices and the Accounting offices walked out at noon, including the Personnel secretary and the General Manager's secretary. (TR 6/15/79; pp. 41, 180–181; PLF. EX. 68)

The New York Office on April 9:

34. In Ecuatoriana's New York operation, there are 20 employees in accounting, three ticket agents, one service employee and one driver; there are two secretaries, one receptionist and three sales representatives. (TR 10/15/79; pp. 154–155)

35. On Friday, April 6, Frank Rodriguez called Rocio Nestor, the Shop Steward in New York and read to her the April 4 letter to Nardi from Baum. (TR 10/15/79; p. 157; PLF. EX. 3A)

36. On Monday morning, before noon, Frank Rodriguez called New York employee Athonsirikul and told her that at noon, "you people punch your cards, sign sick and walk out." Athonsirikul refused, saying she would transfer the call to the Shop Steward, Nestor. (TR 6/15/79; pp. 128, 167)

Rodriguez told her he could be contacted in the Blue Room at the Crossways Inn in Miami and left her that telephone number and the number of Mr. Manners' office. (TR 6/15/79; pp. 128, 165)

The New York enployees remained at work.

Rodriguez then called Athonsirikul back and asked where the people were. Athonsirikul replied that they were working, and Rodriguez stated that the employees should punch their cards and sign out sick, that they could use their sick days. Athonsirikul again transferred the call to the Shop Steward. (TR 6/15/79; p. 129)

Nestor, having received the telephone slip indicating that she should call Rodriguez, returned the call. Rodriguez told her that everybody in Miami had gone out, and the others were to join them, that they should stay united because it was time for the company to pay attention to the employees. (TR 10/15/79; p. 159)

Nestor replied that the New York employees did not have enough proof of what was happening. (TR 10/15/79; p. 160)

Athonsirikul then called Rodriguez back at the number he gave her. It was Mr. Manners' office. She told Rodriguez the New York employees were still working and asked to speak with Menoscal. Menoscal told her that the employees should punch out and sign "sick" on their cards, stating there was nothing wrong with that. Athonsirikul again transferred the call to the Shop Steward. (TR 6/15/79; pp. 129–130)

Athonsirikul then spoke with Union Representative Dumbrowski. He promised Athonsirikul that he would send a telex via Western Union to tell the employees to walk out, and that a union representative would come to the office to talk to them that day. However, the union representative did not show up, and the telegram was not received. (TR 6/15/79; pp. 131–132)

About this same time, Cates told Art Shafer, the New York union representative, that Ecuatoriana had locked out the employees and that the New York employees should picket the company. (TR 10/15/79; p. 189)

Cates also advised Shafer that Shafer should check with the union attorney to see if a permit to picket would be necessary. (TR 10/15/79; p. 189)

Management's Reaction:

37. Although the efforts to pull out the New York employees failed, in Miami, all of the employees then working or scheduled to work, either walked out, or failed to report to work. The only exceptions were one salesman, Baca, one operations employee, Mendez, and approximately five Reservation employees.

The walkout left no employees in Cargo, no Administrative employees, no secretaries in Cargo, Personnel, Administration, or Sales, no employees in the City Ticket Office, one employee at the Airport, and seven employees short in Reservations. (TR 6/15/79; pp. 37–38; TR 6/26/79; p. 33)

38. Ecuatoriana Management waited to see if the employees were going to come back after the lunch hour, and when they did not, Nardi told the managers that the primary objective in the face of the strike was to keep the airline running, to continue to serve the public and to operate on advice from their attorneys. (TR 6/15/79; p. 40)

39. Inasmuch as Ecuatoriana's labor counsel had left on vacation the day before, the carrier had to hire new, replacement counsel to advise them. (TR 6/15/79; p. 42)

40. The question of hiring replacements was left up to the managers*, while Nardi spent most of his time with the new attorneys, preparing for application to Court.* (TR 6/15/79; p. 40)

Nardi was operating without a secretary inasmuch as Ferrer had walked out with the other strikers at noon, along with the Personnel Manager's secretary. (PLF. EX. 6)

41. Shortly after the strike began, Nardi received the April 9 letter from Cates. This was the same letter read by Baum over the telephone to Lyon as the strike was beginning.

The letter put Nardi on notice that it was the union's position that it was up to the carrier to correct what the union considered to be the abuses which caused the strike. A reasonable inference would be that acceding to the union's terms was the only way to end the strike.

The Picketing Permit:

42. In the meantime, on April 9, the IAM, through its attorneys, wrote to the Dade County Aviation Department asking for permission to picket the Ecuatoriana locations. (PLF. EX. 8)

43. At a union meeting held at the Crossway Inn on either Monday or Tuesday, at which both Baum and Menoscal were present, Menoscal asserted to the employees that the company had fired employees from the Cargo Department and that the employees were on strike. She said that the excuse given by the employees when they walked out was that they were sick. (TR 6/26/79; pp. 29–30)

Baum told the employees they were attempting to get a permit to start picketing and that upon receiving the permit, they would be notified to organize the picketing. (TR 6/26/79; p. 30)

The Union's "Plan of Action":

44. On April 10, Baum sent still another letter to Nardi, categorically stating that in any effort to try "to resolve the difficulties presently existing," that certain items "be *first* resolved." Those items repeated or included what the union considered to be disputes with the company, ending with the "reservations training." The letter concluded that the carrier was to be held responsible for the actions of the employees "*until* you agree to resolve the aforementioned." A copy of the letter was sent to Cates. (PLF. EX. 45)

45. Cates' admitted "plan of action" in causing the April 4 and April 9 letters,* both of which were to a similar effect as the April 10 letter, was that if the carrier would agree to what the union considered to be the requirements of the collective bargaining agreement,** Cates would then and only then go back and tell the employees that the union is able now to resolve the problems and the employees would immediately report back to work. (TR 10/15/79; p. 186; *PLF. EX. 4, 6; **TR 10/15/79; p. 182)

46. During Cates' 18 years as union representative, there have been numerous occasions when union employees of other carriers would leave the job or sit down, until the problem was corrected, and in those instances the action which the union historically took was basically the same action as it took in this instance.* In fact, Cates has written similar letters to Eastern Airlines, and historically the procedure has worked, that is, the employees would strike, the union would sit down with the carrier, resolve the problem and the employees would then go back to work. *(TR 10/15/79; p. 186; TR 10/15/79; p. 187)

47. It is clear that the company was being informed of the union's "plan of action," and was put on notice that the strike not only was not going to end on a definite date, but was going to continue indefinitely, until the union's list of disputes were resolved. (PLF. EX. 45)

The Strike Continues:

48. Mendez, the Operations Department employee, who had reported to work on Monday, was called by another Operations Department employee on Tuesday, who told him that the company had gone on strike as of 12:00 noon and that he, Mendez, was not to report in to work. Accordingly, Mendez joined the strike, stayed out of work, shutting down the Operations Department completely. (TR 6/26/79; p. 33)

49. The carrier, receiving no word from the employees as to when the strike would end, and having received only the letters from the union above described, on April 10 sent out letters to the striking employees. The letters informed them of the provisions of the collective bargaining agreement and the Company rules and regulations which were violated by the illegal walkout, and advised them that the carrier was taking steps to replace them. (PLF. EX.7) Copies were sent to the union.

Although the letters were sent out on Ecuatoriana stationery, they had to be typed by the attorney's secretary, inasmuch as the carrier's secretaries were out on strike. (TR 6/15/79; p. 43).

50. By that time, it was more than evident that a strike had indeed occurred, and that Menoscal was in whole or in part responsible for it. The carrier than terminated Menoscal, citing as the reason her inciting other employees to engage in the strike. (DEF. EX. 5; TR 6/15/79; p. 99)

51. Thereupon, Union Representative Dumbrowski called Shop Steward Nestor.

Dumbrowski told her the New York employees should walk out because there were a few people in Miami replaced and Menoscal had been fired.

Nestor replied that they would walk out if they had enough proof, or if a union representative came to the New York City offices to explain what was going on in Miami.

Dumbrowski promised to arrange that. (TR 10/15/79; p. 161)

52. The company received no responses from the union or employees to the April 10 letters, and no one offered to return to work to avoid being replaced. (TR 6/15/79; p. 44)

53. Before noon the next day, Wednesday, in New York, Union Representative Shafer came by the office and asked Shop Steward Nestor to walk out. Shafer was accompanied by the president of the local union and another unnamed person.

Shafer told Nestor that the employees would have to go out immediately. Nestor replied that she did not believe that was right, because the employees did not know what was happening in Miami, and the only thing they knew were the rumors of the strike.

Shafer promised to and did arrange a meeting of the employees that day after 5:00. (TR 6/15/79; p. 135; TR 10/15/79; p. 162; PLF. EX. 12)

54. The meeting was held at around 5:30 that day, at the New York Hilton Hotel.

Present at the meeting were the union president Kramer, Shafer, the Local union secretary, Paggucia, a shop steward from Alitalia, and several employees. (TR 6/15/79; p. 145; TR 10/15/79; p. 163)

Shafer explained what was happening in Miami and asked New York employees to join the Miami employees.

He stated that the Miami walkout was illegal and that the New York employees would have to take the risk themselves, but that three Cargo employees in Miami had been fired. (TR 6/15/79; p. 14; TR 10/15/79; p. 163)

He said that some of the employees in Miami had "got sick" and others had just left or walked out. He told the New York employees that they, too, should "get sick."

One of the employees objected, asking what might happen to them if they claimed they were sick, and the employer discovered they were not. Shafer replied that that was a risk each of them would have to take.

Shafer then stated that the company and the union were going into Court and that if the employees took off sick the next day, nothing would happen to them, and that if the company did not allow them to come back, it would be a lockout. (TR 6/15/79; pp.148–150; TR 10/15/79; pp. 166–167)

The next day, Nestor stayed home sick, but the other employees went to work.

55. In the meantime, in Miami, permission to picket was received from the Aviation Department on April 11 and picketing began forthwith. (PLF. EX. 8)

In addition to the airport facilities, the pickets picketed the carrier's downtown locations and the offices at the back of the airport. (PLF. EX. 9; TR 6/15/79; pp. 44, 46–67)

Replacements Begin:

a) *Cargo:*

56. The Cargo Department employs handlers, cargo agents, clerks and a secretary. (TR 6/15/79; p. 199)

The cargo handlers receive cargo, label and weigh it, pallettize it and bring the pallets in for incoming cargo. They are responsible for keeping the cargo in good condition; they take the cargo from the manifest, put it on the pallets and classify the cargo. They also release cargo to consignees, check the terminal to see what is coming in on the passenger aircraft, and pick up the documents relating to the cargo as it arrives off a passenger aircraft. They pallettize cargo by putting the pallet on a platform, loading it to a certain amount of weight and then putting a net around it in order to secure it. (TR 6/15/79; p. 200)

Cargo handlers have to assist the subcontractor in the unloading of the aircraft and then the placing of the freight on the dock. (TR 6/15/79; p. 265)

The cargo handler removes the cargo from the truck and places it on the dock. (TR 6/15/79; p. 266)

Cargo employees also handle the belly cargo in the passenger airplanes. (TR 6/15/79; p. 93)

The cargo agents work up manifest reservations, cargo reservations, shippers' export declarations, airway bills and any other kind of documentation involved in the shipment. They clear merchandise through customs, advise consignees of the arrival of their cargo and clear both incoming and outgoing flights. They work on the telephones, transmitting information including flight information, receiving cargo reservations, handling questions and dispensing information regarding the cargo. They also deal with forwarding information, giving that information to freight forwarders, shippers and other kinds of customers.

Inasmuch as all cargo flights generally have perishibles on them, they handle quarantining where it is necessary, such as in the case of flowers coming in. They handle aircraft position assignments, inbound flight clearances, tracing of shipments and collecting for freight payments. They also have to report all sales on airway bills which they process. In addition they match the cargo with its documentation. (TR 6/15/79; pp. 200–202)

The cargo clerk has to file all airway bills which are going on a flight; she has to give the accounting manifest and the airway bills. She has to know how many pounds of cargo to report to the Port Authority each month. She separates the airway bills from the manifest. (TR 6/15/79; pp. 202–203)

The cargo secretary handles all the correspondence of the Department, and is responsible for the securing of information for the manager; she takes calls, receives and transmits information which is of concern to management. She handles

and distributes the letters of the Department. She files all cargo claims. In addition, she does the typing and filing. She must be able to transmit and receive teletype. (PLF. EX. 2; TR 6/15/79; p. 203)

The Cargo Department handles from three to four flights per week, depending on the demand. (TR 6/15/79; p. 203)

The normal schedule is for a cargo aircraft to come in on Monday and to go out on Tuesday, for another to come in on Wednesday and go out on Thursday, and the last to come in on Friday and go out on Saturday. If additional flights are handled during a week, the Cargo Department accommodates them either on Wednesdays or Fridays. (TR 6/15/79; p. 204)

There is no slack period after the airplane comes in; paper work has to be done by a cargo agent and it has to be checked against the manifest to see if there are any discrepancies. If so, a discrepancy report has to be filed with Customs. The papers are separated according to the flight coming in and the next flight going out. The employees keep on working without time for rest after an airplane leaves. (TR 6/15/79; p. 269)

57. The carrier's customers use the carrier for air cargo because of the need for speed, and because they expect faster service than any other kind of shipment. (TR 6/15/79; pp. 234–235)

Three cargo airplanes came in and out the week of the strike. (TR 6/15/79; p. 279)

When the regular Cargo employees walked out on Monday, the only employees who stayed was a temporary employee, Capretti. (TR 6/15/79; p. 212)

After the strikers left, Ponte first personally attempted to take care of the frozen shrimp; he called a subcontractor to have them come to unload the aircraft; and he called the consignees. He took the straps and docks out of the pallets

and broke the pallets in order to release the shrimp through Customs. (TR 6/15/79; p. 213)

Although the employees in cargo are not ordinarily scheduled off for lunch at the same time, Ponte waited an hour to see if in fact they had gone to lunch. (TR 6/15/79; p. 258–259)

He found that the manifests and the airway bills were missing, and he had to search for them until he found them. (TR 6/15/79; p. 214)

That afternoon, Ponte received a call from either Nardi or Oquendo who told him that they were going to try to keep the airline open, to continue to give service to the public and to keep the aircraft running on time. (TR 6/15/79; p. 213)

He began calling friends to attempt to persuade them to come in to help him. (TR 6/15/79; p. 214)

Ponte hired five temporary employees to work that day, and continued to use the temporary employee, Capretti, that day. Finally, he hired one permanent replacement, Sanchez, that night. (TR 6/15/79; pp. 216, 270; PLF. EX. 27)

There were threatening phone calls placed to Cargo that afternoon by persons whom Ponte did not recognize. (TR 6/15/79; pp. 272–273)

He worked through until 4:00 o'clock the next morning. (TR 6/15/79; p. 214)

Two of the temporaries, Capretti and Aspillega, had worked for Ponte before and with himself and those two experienced employees they got through the night of Monday of April 9. (TR 6/15/79; p. 217)

The next day, Ponte began hiring permanent replacements. By combining the use of permanent replacements with temporaries, he worked through Tuesday, April 10. (TR 6/15/79; pp. 215–224)

Employee Escarra did not come in to work at all on Monday, April 9, also claiming to be sick. However, he did not report to Ponte as he was supposed to do. (TR 6/15/79; p. 276)

Moreover, Escarra did not return to work at any time during the strike; instead, he picketed the premises. (TR 6/15/79; p. 277, 310; PLF. EX. 38)

Escarra was replaced on Wednesday because an airplane was scheduled to come in on Wednesday and to go out on Thursday. As usual, flight preparations had to be made one day before. (TR 6/15/79; p. 278)

Ponte needed a man to take care of the coming in and the going out of the flight. (TR 6/15/79; p. 279)

Applicant Aracely Farias was interviewed on Tuesday, April 10, for the position of Cargo Secretary. She was hired that day. She worked on April 10 for two hours, working on letters and correspondence and filing. The next day she formally signed her contract for employment and continued working. (TR 6/15/79; pp. 219–220, 285; PLF. EX. 26, 30)

Farias worked full time on Wednesday and Thursday, April 11 and 12. (TR 6/15/79; pp. 222, 283)

On Thursday, at Ponte's direction, Farias familiarized herself with the Cargo Department files. She went through claim letters that day also. (TR 6/15/79; p. 285)

Ponte did not know how long the strike was going to continue. (TR 6/15/79; pp. 230, 271)

By Wednesday, April 11, permanent replacements had been hired for all of the cargo employees. (TR 6/15/79; pp. 215–224; PLF. EX. 27–39)

Using a combination of factors, such as replacing by job title when there was only one employee in the position, as was the case with the Cargo Secretary and the Cargo Clerk, or an analysis of an applicant's experience for the positions of supervisors, and the relative ability and experience of the

other employees as manifested during the interviews. Ponte matched replacements and strikers name by name. (TR 6/15/79; pp. 224)

Ponte testified without contradiction that it would have been impossible for him to operate the Cargo Department or meet the flights during the week of the strike, with fewer people than he did in fact hire, and he needed everyone he hired. (TR 6/15/79; pp. 231–232)

On April 1, Ponte wrote to Nardi explaining why it was necessary to hire the replacements which he hired.

Essentially, he told Nardi that the replacements were necessary in order to continue the carrier's services, particularly inasmuch as it was an international carrier and the company could not afford to stop the operations under the provisions of the IATA. He went on, describing the work that was necessary for the cargo handlers, cargo agents, clerk, and secretary to do.

Concerning the secretary, he pointed out that she was needed to help with the management work, including handling the telephone calls and messages, taking dicatation, typing letters, opening and distributing mail, and controlling inter-office correspondence. (TR 6/15/79; pp. 233–234; PLF. EX. 40, 41)

b) *Reservations:*

58. The Reservations Department is open seven days per week. From Monday through Friday, the ordinary schedule of hours is from 8:00 a.m. to 8:00 p.m., with different agents starting their work day at different times. (TR 10/15/79; p. 5)

Reservations is the principal office as far as information to the public is concerned. The Miami office covers reservations for all of the United States and Canada. Reservations has available to it and disseminates to the public, all of the information needed by the travelling public, including information and details necessary for reservation, tours and

rates. In addition, the office makes the reservations themselves. (TR 10/15/79; p. 5)

The Reservations office also handles Groups, (a group of travellers travelling together), no-show reports, flight checks, pre-paid tickets, reconfirming of flights, teletypes, queues (information which the computer cannot handle automatically), the catering count and the maintenance of administrative files for the office. (TR 10/15/79; p. 6–10)

To render good service in Reservations it is necessary to have a minimum of 12 people working each day. (TR 10/15/79; p. 6)

59. When the four Reservations agents marked their timecards "sick" and walked out at noon, they violated instructions, since no agent, including the supervisors, may mark time cards. (TR 10/15/79; pp. 20–21; PLF. EX. 46)

60. The Reservations Department worked through Monday afternoon by having the employees who refused to walk out forego their lunch period and continue working. (TR 10/15/79; p. 21)

61. Much of the reservations work is done over the telephone and each console has a desk with a telephone on it. (TR 6/15/79; p. 185)

At about 1:00 or 2:00 p.m. on April 9, harrassing telephone calls began to come in to reservations in great numbers.

The first one received by employee Lyon was from Yedo, the same employee who had threatened to "beat up" Personnel Manager Oquendo at the union meeting on Friday, April 6.

Yedo called Lyon dirty names and asked why she was still working. (TR 6/15/79; p. 185)

Reservations Agent Camacho received telephone calls that afternoon. One was from Cargo Agent Ferres, who told him that he, Camacho, was trying to break the strike and that "we are going to break your neck." (TR 6/26/79; p. 9)

Reservations Agent Suarez received a call wherein the caller stated that because she stayed at her position, she was an SOB, and she was told "we are going to burn you." (TR 6/26/79; p. 6)

As a result, Suarez moved out of her home for a week.

Polizzotto received a great number of obscene telephone calls that afternoon, and others wherein the callers stated that if she did not cooperate they would "fix" her. (TR 6/26/79; p. 21)

Camacho received many telephone calls that afternoon wherein the callers would call and then hang up. (TR 6/26/79; p. 10)

That practice was repeated with the other agents. (TR 6/16/79; p. 186)

These incidents continued throughout the strike occurring every day of the strike, about 50 to 60 times a day or more. (TR 6/15/79; p. 21, 186–188; TR 6/26/79; p. 10, 21)

Moreover, on Monday night, Yedo called Lyon back, identified himself and attempted to convince her not to go to work the next day. When Lyon would not agree with him, he told her that he was going to break the fingers of both her hands. (TR 6/15/79; p. 186)

These telephone calls, besides the unsettling effect on the employees receiving them, had the effect of tying up the telephone lines, added to the confusion and to the degree of the emergency faced by Almeyda in deciding the timing and number of replacements to be hired.

Ordinarily, the work in the Reservations Department slacks off after 6:00 p.m. Inasmuch as the employees were working under the strain of the harrassment, the emergency conditions, and did not have any lunch break, Almeyda shut down the Department at 6:00 on Monday. (TR 10/15/79; p. 24)

Almeyda, however, remained in the office until 10:00 p.m. (TR 10/15/79; pp. 24, 35)

62. On Tuesday, April 10, employee Savala, who had remained at work Monday afternoon, did not come in, reporting "sick." In addition, employees Cruz and Mola, who had been off Monday, both reported in "sick."

In addition, another employee, Maria Lopez, had been out sick before the strike began, and another employee, Mrs. Lignarolla, who was very close in time to delivering her baby, reported sick on Tuesday. Accordingly, on Tuesday, Reservations were 10 employees short. Almeyda attempted to run the department on Tuesday with four agents and two supervisors, but it proved impossible. (TR 10/15/79; p. 26)

Almeyda attempted to call some of the striking employees but could get no answer at their homes. (TR 10/15/79; p. 37)

He called two employees, Esther Suarez and Camacho, who were scheduled to be off on Tuesday and Wednesday and they agreed to come in to work overtime. (TR 10/15/79; p. 25)

Almeyda asked employee Pacios to come in on her days off, Thursday and Friday, and she agreed to do so. (TR 10/15/79; p. 37)

On Tuesday, the employees again did not take lunch, and again handled threatening phone calls as they had on Monday.

On Tuesday afternoon, Almeyda went to Administration and told them that something had to be done because the situation in Reservations was "crazy." He was told that Administration could not take the time to assist him, and he had to handle the situation himself. (TR 10/15/79; p. 28)

Accordingly, Almeyda began going over pending application files and decided to call people he had already met in interviews previously. Almeyda called some of the appli-

cants and offered them permanent employment. (TR 10/15/79; p. 28)

63. By Wednesday, none of the seven strikers who had left or had failed to report in, called, and all remained away. Reservations remained ten employees short. (TR 10/15/79; pp. 27, 34)

Three of the applicants, Francisco Reyes, Elena Reyes, and E. Palmer, came in for interviews on Wednesday, April 11, at about 8:15 a.m. They filled out applications, were interviewed and hired permanently. All began working that day at 9:00 a.m. (TR 10/15/79; p. 31; PLF. EX. 47, 48, 49)

Applicant Adolfo Diez came in for an interview on Wednesday at noon and was hired permanently. (TR 10/15/79; pp. 31, 33; PLF. EX. 50)

Diez reported in and began working full time the next morning. (TR 10/15/79; pp. 67, 79)

Palmer worked a full day on Wednesday and Thursday. (TR 10/15/79; p. 70)

Francisco Reyes worked from 9:00 a.m. until 12:00 noon on Wednesday and came back full time on Thursday morning. (TR 10/15/79; p. 69)

Elena Reyes worked from 9:00 a.m. until 12:00 noon on Wednesday and came back full time on Friday morning. (TR 10/15/79; pp. 67–68)

Almeyda allowed the newly-hired replacements to take time off where necessary in order to tend to their affairs so that they would be able to come back and work full time. He did this because he did not wish to lose them, and recognized that they were doing him a favor coming in under emergency circumstances and on such short notice. He felt that, secure in the knowledge that he had them hired, he could cover the time when the replacements had to be off to tend to their affairs by having the other employees work overtime and come in on their days off. (TR 10/15/79; p. 79)

In fact, the Reservations agents who did not strike worked through their lunch hours, worked overtime, and worked their days off. (TR 6/15/79; pp. 193–194; TR 6/26/79; pp. 15, 21–24)

Moreover, Almeyda had no idea how long the strike would last at the time he hired his replacements. (TR 10/15/79; p. 36)

Almeyda testified that his judgment of necessity in hiring the replacements he did stemmed from the fact that inasmuch as Ecuatoriana is an international carrier of passengers, cargo and mail, and inasmuch as the reservations Department is the "central nerve" of the carrier, it was necessary for him to replace those people when he did in order to have minimum coverage for the Reservations Department. It was especially important to cover the functions and duties of the Miami office, and to keep an accurate inventory of the flight bookings, because if mistakes were made in Miami, it would reflect immediately in Quito where the flight inventory is kept. He felt that any mistakes in Miami which would trigger problems in Quito would create a "very risky situation" leading to overbooking or empty flights. (TR 10/15/79; p. 41).

I find the action described above ascertainable under the circumstances then existing and I find further that the replacements hired were necessary to continue the operation of the Department and to continue to serve the public.

After the strike was over, inasmuch as one of the supervisors, Mrs. Lopez, had been replaced, Almeyda opened up the supervisor's job for bidding and the bid was awarded to one of the pre-strike employees, Mrs. Lyon. (TR 10/15/79; p. 72)

This procedure was also proper under the circumstances.

(c.) *The Downtown Offices:*

i. *Sales*

64. At the time of the strike, the carrier employed two Sales Representatives, Enrico Baca and Frank Rodriguez.

The duties of Sales Representatives includes dealing with travel agencies. The Sales Representatives must be acquainted with the different programs to the travel agencies. They must be familiar with the type of equipment the company flies, the seat configuration and the like. They must know and sell the programs the carrier offers.

In addition, they must handle inquiries received from various people who call the company seeking information (TR 10/15/79; p. 110)

The two Sales Representatives service a five-state area. In Florida alone, there are approximately 975 travel agencies which they service. (TR 10/15/79; p. 110)

The evidence disclosed that it is part of a Sales Representative's normal job to be in the City Ticket Office as well as being upstairs in his own office and out on the road. (TR 10/15/79; p. 136)

It is part of his normal job to answer the phone and talk to travel agencies. (TR 10/15/79; p. 136) He must service the requests of customers and accounts, furnish information, and it is a normal part of his job to assist the Sales Manager in the operation of the Sales Department. (PLF. EX. 2, p. 13)

65. As aforesaid, Rodriguez had joined the strike on Monday, but Baca continued to work.

After the strike began, false information began to be disseminated on the carrier's computer, stating that the airline was not operating because of the strike. Travel agencies, passengers, and groups to whom the carrier had previously sold flights began calling because they didn't know whether or not the carrier was shut down. (TR 6/15/79; p. 49; (TR 10/15/79; p. 115)

Nardi was forced to leave the preparations for Court proceeding and to put a manager and himself on trying to

correct this misinformation which could result in irretrievably lost business. They began by calling the computer center in Atlanta, the communcations center offices in Atlanta, sending telegrams to the airlines and asking them to contact Nardi or the manager personally, and informing them that they had not stopped operations. (TR 6/15/79; p. 49)

These actions, however, did not correct the problems with the travel agenices which "were in panic." Contact with the travel agencies is ordinarily through the two sales representatives.

Baca had reported to work on Tuesday, but Rodriguez again did not. (TR 10/15/79; p. 114)

Nardi decided that the sales force must undertake immediately to controvert the false charges. (TR 6/15/79; p. 86)

It was necessary to take Baca off of his other duties on Tuesday morning to handle these inquiries from the Sales Representatives' customers, because if the customers were not advised speedily as to the correct state of affairs, the carrier could lose considerable business and competitors would immediately capture that business. (TR 10/15/79; p. 115)

Moreover, the sales secretary was out on strike and was not available for help. (TR 10/15/79; p. 115)

The effect of this was that there was no one handling the other sales representatives' duties from Tuesday on.

Herrero, the Sales Manager, discussed all these problems with Administration on Tuesday afternoon.

The management representatives did not then know how long the strike would last. Their judgment, however, was that they had to do something in order to continue to serve the public, to correct the misinformation, to help keep the airline flying and alleviate the problems.

Nardi accordingly instructed Herrero to replace those he deemed necessary, including the sales representative who was then on strike, i.e., Frank Rodriguez. (TR 6/15/79/ p. 53, 83; TR 10/15/79; p. 116)

At that time, Nardi was not aware of Rodriguez' activities in attempting to persuade the New York, or other, employees to join the strike, nor of any misconduct on Rodriguez' part. (TR 6/15/79; pp. 50, 57)

At 4:00 p.m. Tuesday, Baca received a telephone call. Herrero overheard Baca repeat to the caller threats to break Baca's legs. When Baca hung up, he reported to Herrero that the caller had threatened him with physical harm including the breaking of his legs. Baca, a long-term employee, is a man of small stature and advanced age. He appeared to Herrero to be nervous and Herrero was worried about him. Accordingly, Herrero told him that he could go home, to relax and take it easy, inasmuch as it was close to 4:30. Baca accordingly left. (TR 10/15/79; pp. 117, 118, 132, 134)

Herrero gave Baca permission only to go home; he did not suggest that he, or permit him to, join the strike. (TR 10/15/79; p. 138)

Baca however, went on strike, and began picketing on Wednesday. (TR 6/15/79; p. 51; TR 10/15/79; p. 118–119; BACA testimony 12/11/79

When he sent him home on Tuesday evening, Herrero did not know that Baca would not report for work on Wednesday or Thursday or until the Court ordered the strikers back. (TR 10/15/79; p. 138)

He did not find out that Baca was coming back until Friday, April 13. (TR 10/15/79; p. 138)

Thus, on Wednesday, the carrier was faced with a complete absence of Sales Representatives to deal with Correcting the customers' misinformation.

On that morning, Herrero received an application for employment from Beatriz Diez.* Herrero permanently hired Diez and put her to work immediately. (PLF. EX. 57)

Her first duties were to attempt to salvage business by answering the telephones to inform callers that the airline was operating, and to contact the travel agencies and group representatives. She took "care of everything at the office," and began acquainting herself with the carrier's programs, types of aircraft, itineraries, and handled telephone calls for new business. (TR 6/15/79; p. 53; TR 10/15/79; p. 119)

On Friday, April 13, Baca and Rodriguez returned. Baca was put back to work without incident. Rodriguez was read a statement by Herrero to the effect that he had been replaced by a permanent replacement, but that he would be notified if a position in his classification or a comparable position for which he was qualified became available. Rodriguez made no comment. (PLF. EX. 63)

On April 13, Herrero wrote Oquendo recapitulating the necessity of replacing, inter alia, Rodriguez. Herrero pointed out that this was necessary to cover the travel agencies, commercial accounts, groups, etc., in order to keep the sales. (PLF. EX. 63)

ii. *Accounting:*

65. By virtue of a posting which she had bid on and won, Accounting Assistant Sosa was transferring in to Miami from Chicago and was to report for work on Monday, April 9. (TR 12/10/79; p. 36)

The week before, she called Finance Manager Guerra and asserted that she would be on the job Monday.

On Monday, however, she called Guerra again, and stated that on instructions from her co-worker, she was not reporting for work.

On Tuesday, she called in, claiming that she was "sick."

She did not call in again, but stayed off the job during the entire period of the strike, reporting in with the other strikers on Friday, April 13.

The other accountants and accountant assistants, including Moscoso, who was to remain in the Miami office for a few days to break in Sosa, had all struck. (TR 12/10/79; Guerra testimony)

The accounting work which remained to be done on Monday through Thursday included making the payroll, handling checks to suppliers, working up accounts payable, codifying accounting documentation, checking manifests, handling received monies, and working up deposits, checking and verifying accounts receivable, office income, income and other taxes and the like. (TR 12/10/79; Guerra testimony)

In fact, all the regular work of accounting remained to be done, which includes maintenance of equipment, inventory, CAB procedures, insurance matters including Workman's Compensation and aircraft liability, maintaining records and files, and preparing vouchers and checks. (TR 12/10/79; Guerra testimony; PLF. EX. 2, p. 10)

On Monday, Guerra spent all day attempting to put in order documents, checking monies received, clarifying the status of the payroll, attempting to establish controls, and the like, all duties which ordinarily would have been performed by the striking employees.

His primary concern at that point was the Miami office, because the product of the accounting work there was immediately required by Company headquarters in Quito (TR 10/15/79; p. 126; PLF. EX. 62; TR 12/10/79; Guerra testimony)

Guerra, as Fianance Manager, was aware that certain accounting functions must, if at all possible, continue unabated.

Moreover, there were only three accounting employees covering the Miami operation and at the time of the strike,

one of them, Escobar, was on vacation. Thus, at the strike's beginning, the Miami accounting operation was already short one employee.

Accordingly, when he learned that Administration had decided to attempt to continue to operate the airline, Guerra set out to hire replacements for the Miami office first. He interviewed replacement applicant Lydia Ares and on April 11, recommended to Personnel that she be hired permanently. This was done. Ares replaced striker Cougil, (PLF. EX. 65, 69)

(It was on this day that Cougil was carrying the picket sign which Cates ordered changed (discussed below)) (TR 10/15/79 p. 131; PLF. EX. 67)

When the strike continued into the fourth day, i.e., April 12, and Sosa still remained out, Guerra interviewed and recommended permanent hiring of replacement employee Ortiz and this was done. Her hiring was also for the same reasons Guerra judged it necessary to hire Ares to man the Miami accounting office. Although Ortiz was hired on April 12, she was unable to begin her actual duties until the morning of April 13, which she did. (PLF. EX. 64, 71)

The next accounting replacement hired was replacement employee Mimbela, who was hired to replace striker Morehouse, who worked in accounting at the Administrative offices. But Mimbela left the employ of the carrier, and Morehouse returned to work, with little or no work loss after the strike ended.

Guerra, like Herrero, at the time they were engaging in the hiring of replacements, did not know when or if the strike would end.

On April 13, Sosa and Cougil reported in with the other returning strikers and were handed notes by Herrero to the effect that they had been replaced by permanent replacements, but that when a classification in their, or a com-

parable, position for which they were qualified became available, they would be notified. (PLF. EX. 63)

Herrero and Guerra testified without contradiction that they needed those replacements in accounting and that the accounting information generated or to be generated by them was needed in Quito. (TR 10/15/79; pp. 126, 128)

Herrero, on April 13, explained his reasons to Personnel; they included that it was necessary for the carrier's continuing operations, in that the replacements were indispensable to maintaining the processes of the station, including the making of deposits and payments, processing tickets and cargo, and trying to make up for the setback in accounting and control. (TR 10/15/79; pp. 127–128; PLF. EX. 63)

d) *The Airport:*

66. In preparing the flight for departure, employees must take care of passengers, check them in, check the luggage, take care of Immigrations, customs, lost and found, loading of the aircraft and handling of manifests. They must make sales reports, make deposits to the bank, handle progressive clearances, handle the boarding of the aircraft, and give the weight and balance on the particular flight to the proper personnel. In addition, the employees have to work the gate which, concerning in-transit flights for example, requires leaving an agent at the gate to control the passengers to prevent improper disembarking. They must assist the crew in any manner needed, including the transmission of necessary information.

The employees must also handle the boarding of local passengers. In addition, the airport employees perform counter work, which includes checking the passengers, tl eir luggage and preparing the manifests.

The ticket counters at the airport have a computer which the airport employees work, including bringing out the records of the flight and making reservations.

Moreover, the airport employees have charge of fleet service work, which involves taking proper care of the commissary relating to the aircraft.

In addition, the employees handle overbookings and when overbooking occurs, they have to take care of the passengers, including handling of denied boarding compensation. In addition, they have to check the passengers who are already confirmed on the flight.

The airport employees use, in addition to the computer, teletypes, typewriters, adding machines and telephones. (TR 6/26/79; pp. 40–42)

They must also furnish air and ground transportation information, arrange interline transfers, handle messages for passengers, receive and send teletypes, collect fares, and clear documentation. (PLF. EX. 2, pages 7–8)

They must also take care of claims, and give information to the public; in fact, dispensing information constitutes an important part of their duties. They also make out their sales reports and manifest reports. (TR 6/15/79; pp. 113–114)

67. On Monday, the teletype communications were not working properly, and the telephones were working only partially. (TR 6/26/79; pp. 118–9)

Moreover, because of the publicity attendant to the strike, the airport received many extra telephone calls from passengers, and each of those telephone calls had to be answered in detail. (TR 6/26/79; p. 113, 138)

In addition, on Monday and thereafter, the same types of telephone calls which had been received on Sunday continued. Some were obscene calls and others were of the type wherein the caller did not speak. (TR 6/26/79; pp. 47, 120)

The harrassing telephone calls had the effect of disrupting the operation at the airport; it added to the stress of the emergency situation and interrupted attempts to perform other work. (TR 6/26/79; p. 130)

The Airport Manager, Martin, worked at the airport all day Monday, and the Assistant Manager, Pato, came in although it was her day off. (TR 6/26/79; pp. 45–6)

The Airport Manager attempted to take care of the airport functions himself, answering the phones, taking care of the passengers and lost and found. He also worked at the counter. (TR 6/26/79; p. 46)

While Martin was doing these things, Pato was working in Operations. (TR 6/26/79; p. 47)

68. On Tuesday, no airport employees showed up; there was a flight scheduled in that afternoon.

The Airport Manager was advised by Administration that the carrier had to take care of the flights, and that the company was not going to cancel flights because of the strike. Accordingly, the Airport Manager began interviewing replacements, and so he determined to begin hiring that day. (TR 6/26/79; p. 48–9)

In the meantime, while the telephone calls were coming in at the airport, Pato on both Tuesday and Wednesday could see the striking employees leave the passenger benches and go over to a set of public telephones; while they were using the telephones, the harrassing phone calls were coming in at the airport counter. (TR 6/26/79; p. 139)

Jose Yedo was one of those who called in "sick" on Sunday morning, and was absent along with the rest of the shift claiming to be sick. He was scheduled off on Monday and Tuesday, but he joined the strikers sitting in the passenger benches across from the counter, on Tuesday. (TR 6/26/79; p. 127–8)

Inasmuch as all of the Operations employees except one went on strike, on Monday, and all were on strike by Tuesday, Pato had to devote her time to Operations, including weight and balance and fuel consumption. (TR 6/26/79; pp. 50, 121–2)

Since no replacements could be found, this was contracted out temporarily to Belize Airways and it was necessary that Pato work with them, giving them the necessary information, Ecuatoriana manuals, and the like. (TR 6/26/79; pp. 122–3)

Pato was working 15 to 16 hours per day, since Sunday, and worked through the night on Tuesday. (TR 6/26/79; pp. 136, 144, 151)

Martin had been working 18 to 19 hours per day since Sunday. (TR 6/26/79; p. 52)

With Flight 54 due to arrive at 5:15, Martin began hiring replacements.

Martin hired Flavia Sanchez to replace J. Pareja and she began working around 11:00 a.m. Tuesday. (TR 6/26/79; pp. 48, 54; PLF. EX. 15)

Since no one had shown up at Fleet Service, Francisco Milian was to replace J. Yanez. (TR 6/26/79; pp. 51, 55; PLF. EX. 16)

In Fleet Service, the keys for the van are necessary because the van is used, inter alia, to provision the flight in Miami with the inflight kitchen provisions. The van supplies last minute supplies or items which the catering did not supply, and which Ecuatoriana holds in stock. In addition, the vans are used to transport the crews from the terminal to the air hotel and back. (TR 6/26/79; pp. 126–7)

When the fleet service replacements began to be hired, it was discovered that the keys to the vans were missing.

The first thing the fleet service replacement had to do was to obtain new keys for the vehicles. (TR 6/26/79; p. 52)

By the use of what replacements had been hired, and two temporary employees, the carrier was able to handle the 5:15 p.m. flight arriving on Tuesday. (TR 6/26/79; p. 52)

69. Another flight, No. 51, was scheduled to arrive in Miami at 2:30 Wednesday morning and depart at 3:30 a.m. The shift designed to handle that aircraft was scheduled to begin work at 10:00 p.m., Tuesday night. However, as with the other shifts, no one showed up for it. (TR 6/26/79; p. 53)

Replacements were interviewed and hired to handle that flight. There was no time to perform the paperwork before the flight came and left on Wednesday morning. Therefore, replacements signed their permanent employment contracts later. (TR 6/26/79; p. 54, 58)

Those so hired were Francisco Javier Almeida (PLF. EX. 17), Blas Zufic (PLF. EX. 18), Victor Acosta, (PLF. EX. 19), Luis Del Solar (PLF. EX. 20), Mary Rodriquez (PLF. EX. 21), Clara Winkler (PLF. EX. 22), and Amparo Burbano (PLF. EX. 23). (TR 6/26/79; p. 55–8)

In addition, Fleet Serviceman, Andy Dee was hired to replace striker Ramiro DelGado. (PLF. EX. 24)

At the end of the shift, at 4:15 a.m., Wednesday, Pato Burbano, an employee called Yolanda, and Almeida went to Almeida's car in the airport parking lot. They found the car had had acid poured over it and the windshield broken. When the Port Authority police were called, they delayed them while the automobile was searched for bombs, brake fluid checked and the like. (TR 6/26/79; pp. 59, 135–6)

Pato did not arrive home until 6:30.

As a result of the incident, the employee Yolanda immediately quit; Almeida quit two days later. (TR 6/26/79; pp. 55, 59, 136)

Using factors such as the first replacement hired to replace the first employee not reporting in on the second day of the strike, or experience as shown by the employment application and resumes, Martin began matching replacements' names with strikers' names. He followed this procedure with four of the strikers. With the others, the experience being

more or less equal, he selected names at random and matched them. (TR 6/26/79; pp. 60–1)

Yedo was scheduled to report in at 2:00 p.m. Wednesday, but he did not do so. Management was aware that he was part of the sick-out of Sunday, April 8, and that he had joined the strikers at the airport on Tuesday.

The decision-making process by virtue of which Yedo was replaced was completed at 6:00 p.m. Wednesday. His replacement, Acosta, was needed for Flight No. 74 which was due to arrive at 8:15 p.m. and then depart at 1:00 a.m. Thursday. (TR 6/26/79; pp. 85–6)

Pato could not work in preparation for Flight 74 because of the absence of secretaries, ticket agents and sales representatives in the City Ticket Office and the District Sales Office. The phones there were constantly busy and Pato spent most of the afternoon manning the phones, principally helping to answer inquiries as to whether or not the company was operating normally or not. It was necessary that this be done so that business would not be lost to competitors. (TR 6/15/79; p. 53; TR 10/15/79; pp. 115–119; PLF. EX. 63)

As it turned out, the airplane was late, and so by going to the airport in the evening, Pato worked the arrival itself. She stayed on to work the Thursday morning departure of the airplane. (TR 6/26/79; pp. 137–138)

70. Five employees were needed to handle the flight coming in at 1:00 a.m. on Thursday. One agent was sent to the gate where he had to remain with the aircraft, one was sent to customs to stay with the passengers in Customs, one was sent to Immigration, and one to handle the Progressive Clearance, which was needed on that flight. The fifth agent had to stay at the office in order to check in passengers and work on the manifest. (TR 6/26/79; p. 79)

Pato did not arrive home till about 5:00 or 6:00 Thursday morning. (TR 6/26/79; p. 141)

By Thursday morning, the airport work was piling up and there were not enough airport employees to work at the station. (TR 6/26/79; p. 141)

Nevertheless, no more permanent replacements were hired.

71. During this period, the airport employees did not go out to lunch; the Manager had food brought in so they could continue to work. (TR 6/26/79; p. 53)

72. None of the striking employees ever offered to return to work while the strike was in progress. (TR 6/26/79; p. 68)

73. The Airport Management had no idea when the strikers would terminate the strike of their own volition. (TR 6/26/79; p. 144)

74. The replacements were given permanent positions, and some of them gave up other jobs to come to work for Ecuatoriana.

75. As noted above, Almeida was hired on April 11, but his automobile was vandalized, and he quit on April 13. (TR 6/26/79; pp. 55, 59)

Almeida had replaced striker Enrique Patterson, who thus returned to work upon Almeida's departure. (TR 6/26/79; p. 65)

Another of the employees, Gabriel Castillo, whose replacement had left, was also called back to work on April 13 and returned to work without incident. (TR 6/26/79; pp. 65–66)

Four of the striking employees were not replaced; on Friday, April 13, they returned to work without incident.

Accordingly, out of a total of 16 airport employees who went out on strike, Ecuatoriana had replaced five of them and two supervisors, plus two fleet servicemen and a driver. (TR 6/26/79; p. 66)

76. Martin and Pato testified without contradiction, that it was impossible for them to use any fewer employees than

those replacements which he did hire, and that they needed every employee hired as a replacement. (TR 6/26/79; pp. 67, 144)

77. Five days after the strike was over, inasmuch as the supervisors had been replaced, Martin posted the jobs of the two supervisors and two of the strikers, Patterson and Blankenship, were awarded the jobs of supervisor. (TR 6/26/79; p. 68)

e) *The General Manager's Executive Secretary:*

78. As noted above, General Manager Nardi was working with his newly-hired counsel trying to prepare this matter to be submitted to Court, and to prepare the various documents sent to the strikers. He met when he could with the managers to discuss their problems and coordinate the various activities. He worked at attempting to prevent loss of business through the possible mistaken belief that the carrier was shut down by the strike. (TR 10/15/79; p. 152)

He was working 16 to 18 hours per day. (TR 6/15/79; p. 44)

He was without the use of a Secretary, since Elvia Ferrer, his secretary, the Personnel Manager's secretary, and indeed, all of the secretaries had joined in the strike.

Nardi's secretary was the only "confidential and/or executive" secretary in the Company. (PLF. EX. 2, letter 5, 10/11/77)

In addition to those confidential and executive secretarial functions, his secretary was to perform the ordinary duties of a secretary, including taking shorthand, transcribing dictation, operating office machines, handling correspondence, mail, and records.

She must also be able to operate a teletype, transmitting and receiving messages.

Finally, she must be able to perform routine office and clerical functions. (PLF. EX. 2, page 11, ¶ G)

On Wednesday, April 11, Herrero referred Nhora Abuchaibe to the Administrative Offices for interviewing for filling the position of the General Manager's Secretary. (TR 10/15/79; p. 122; PLF. EX. 60)

As her application and resume show, she was highly qualified and experienced as an Executive Secretary in the airline industry, and her skills included qualification as a telex operator. (PLF. EX. 60)

She was permanently hired on Wednesday, April 11, and began work. (PLF. EX. 60)

Additional Harrassment:

79. The foregoing history of the hiring of the replacements must be considered, inter alia, against the backdrop of the harrassment and vandalism peppered throughout it, and the resultant strain on Management personnel responsible for handling replacements.

This is particularly important because of the impact on the replacements who may not have chosen to embroil themselves into a heated strike, if it were not for a promise of permanent employment upon which they could rely.

Much of it involved anonymous harassment and threats over the telephone, but not all.

Compounding the problems incident to the strike were specific instances of misconduct on the part of named strikers.

Francisco Milian was hired April 10, 1979, in Fleet Service. He had previously worked for Ecuatoriana for two and a half years as a stock room clerk and supervisor and was thus familiar with certain of the striking employees and he was known to them. (TR 10/15/79; p. 85)

On the afternoon of April 10, Milian left the ticket counter at the airport. He was confronted by Messrs. Yedo and Domingo Martinez, both of whom he knew. Yedo told Milian that he was breaking the strike, to which Milian replied that

he was doing his job and intended to keep it. Yedo then began calling Milian names and told him "we are going out to get the rooster, which is going to break your legs." (TR 10/15/79; p. 87)

The foregoing is a Spanish expression the effect of which was that they were going to get someone else to injure Milian.

Milian turned around and went back to the ticket counter, saying to Yedo that there was "no way you're going to do it." (TR 10/15/79; p. 88)

That afternoon, Milian received approximately 20 telephone calls from Yedo, during which Yedo urged Milian to be wise and to get out before he gets hurt, and to the effect that there were people who were going to beat up Milian in the parking lot, and that Milian should leave. Milian declined to do so, stating that he was going to continue to work. (TR 10/15/79; pp. 88–89)

Milian got off work at 4:30 Wednesday morning and when he went home received two telephone calls from Yedo voicing similar threats. (TR 10/15/79; p. 91)

He received other telephone calls from persons whose voice he could not identify, and he took the telephone off the hook so he could get some sleep. (TR 10/15/79; p. 90)

At 8:30 Wednesday morning, he received a telephone call from Mrs. Menoscal. Mrs. Menoscal informed Milian that he was breaking the strike, but Milian disagreed. Menoscal then became insulting, calling him various names, claimed that he was taking food away from the people who lost their jobs and that he was going to get beat up. (TR 10/15/79; p. 91–92)

Milian next received telephone calls from Carlos and Marguerita Roche, strikers whom he had known for many years. Mr. Roche first attempted to persuade him to quit his job, and when Milian declined to do so, Mrs. Roche became angry, called him names and stated that he was going to get hurt. (TR 10/15/79; pp. 93–94)

Later that day, Milian returned to work and received a call from Frank Rodriguez, who attempted to persuade him to quit, because it was "better" for Milian. Rodriguez told him "those people might do anything." Milian replied that there was no way that Rodriguez was going to make him quit. (TR 10/15/79)

Similar types of harrassing telephone calls to Milian continued with great frequency on a daily basis. (TR 10/15/79; p. 95)

Milian continued to work as replacement, through the strike. The following Monday, April 16, another replacement employee, Flavia Sanchez, asked Milian to accompany her to the ticket counter because she, too, had been threatened and also called names. (TR 10/15/79; p. 97)

Milian accompanied her up the steps from the baggage department; as they arrived at the top of the steps they were confronted by replaced strikers Yedo, George Linares, from the Cargo Department, and another, unnamed replaced striker. As they neared the ticket counter, the trio began calling them names, and Linares continually drew his hand back as if he were going to strike Milian. (TR 10/15/79; pp. 97–98)

Milian accompanied Sanchez to the ticket counter and then left, the group following him, insulting him. Milian rode down the escalator with the group of three in tow. As he reached the bottom, Linares again raised his hand as if to strike Milian and Yedo stated "let's kill him." (TR 10/15/79; p. 98)

Milian thereupon produced an unloaded pistol and stated "Okay. Let's see who's going to kill me." (TR 10/15/79; p. 99)

The trio stopped and Milian ran to this truck. (TR 10/15/79; p. 99)

After that, Sanchez quit her job, and the striker whom she had replaced, Pareja, returned to work.

The Union's Involvement:

80. In addition to the letters, the obtaining of the picketing permit, and the admitted "plan of action" described above, the Union engaged in other acts and omissions.

81. After the strike began on April 9, no union representative ordered the employees back to work. (TR 10/15/79; pp. 183–184)

82. The IAM admitted that once the strike began they felt they were not in a position to tell the people to go back to work. (TR 10/15/79; p. 178)

83. The IAM further admitted that that was the way they had always operated, and that the union felt there was no other way to handle the situation. (TR 10/15/79; p. 178)

84. The union stipulated that Cates was afraid to tell the people to go back to work, and that he took no disciplinary action against them under the constitution or by-laws of the union. (TR 10/15/79; p. 178)

85. Neither Cates nor Baum nor anyone else in the union informed the union members that they could be brought up on charges or disciplined.

86. Moreover, the union did not intend to discipline or attempt to discipline the employees for engaging in the strike, and none of them has been disciplined in any manner for the action. (TR 10/15/79; pp. 184–185)

87. The reason Cates did not order the employees back to work was that he wanted to get with the company, straighten out the problems and the employees would then take it upon themselves to return. (TR 10/15/79; p. 185)

88. Cates monitored the picket signs, telling the pickets in one instance to change one of the signs relating to safety. (TR 10/15/79; p. 188)

89. The union paid for the hotel room used by the strikers. (TR 10/15/79; p. 178)

90. On Wednesday at the meeting of the strikers at the Crossways Inn, attended by Menoscal and Baum, the union representatives told the strikers that they were going to "stick it out" as long as was necessary. (Escarra Testimony; 12/11/79)

91. On Tuesday at the meeting of the strikers at the Crossways Inn, Baum addressed the strikers and told them he had good news for them, that the employees in New York, Chicago and Los Angeles were with them, and if "we" are all together, "we" can win; at that, the strikers began cheering. (Baca Testimony; 12/11/79)

92. At the Crossways Inn on Wednesday, Menoscal set Baca's picketing schedule and directed him to picket the downtown offices. (Baca Testimony; 12/11/79)

93. After the strike was ordered to be ended, Cates undertook to raise money via donations for the replaced strikers. (TR 10/15/79; p. 190)

One of such funds totaled $5,000.00. (TR 10/15/79; p. 190)

94. After the Court Order of April 12, the union did not stop its picketing; after a temporary halt, the picketing began again and continued for an undetermined time. (TR 6/15/79; p. 48)

The Carrier's Inability to Foretell the End of the Strike:

95. The defendants, who are in a better position to determine when the strikers would have returned, have failed to carry the burden of showing when the strike would have ended.

At no time during the hiring of the replacements did Ecuatoriana know the point in time when the strikers would have voluntarily returned to work, nor were they able to do so.

Under the dictates of *National Airlines, Inc.* v. *Machinists*, 430 F.2d 957 (5th Cir. 1970), 74 LRRM 2833, 2834, the role of this Court as trier of fact ordinarily would include a determi-

nation of when the strikers would have returned to work, and who had been replaced as of that time, and to enter a direction that those not then replaced be reinstated.

Under these circumstances, wherein defendants offered no evidence as to when the strike would have ended, and the carrier had no such knowledge, it is impossible to determine when the strikers "would have" returned to work. Accordingly, the Court can find only that the strike did in fact end when ordered to do so by this Court, something which Ecuatoriana could not have known beforehand.

The Strike Ends:

96. As soon as the Court hearing on the evening of April 12 was over, Ecuatoriana stopped all interviewing and hiring of replacements. None were hired after the Court Order. (TR 6/15/79; p. 47)

97. Managers were instructed by Nardi that if any strikers who had not been replaced came back to work, they should be taken immediately. (TR 6/15/79; p. 47; TR 10/15/79; p. 196)

That was done; all those strikers who had not been replaced were reinstated to their former or substantially equivalent positions when the strike was ended, and they returned to work without incident. (TR 6/15/79; p. 47; TR 10/15/79; p. 37–38; 196)

Those that had been replaced were told they had been, but that if their replacement left, or if another position for which they were qualified became vacant, they would be recalled. (TR 6/15/79; p. 231)

This, too, has been done on at least five occasions since April 13, with strikers Tio,* Castillo, Patterson, Pareja, and Morehouse. * (TR 6/15/79; p. 231)

The Defendants' Case:

98. The testimony of the carrier's witnesses was left largely uncontroverted.

99. Defendants called striking employees Lopez and Escarra who testified that after the strike certain temporary positions opened up and replaced strikers in some instances were used, and in other instances were not used to fill those positions. Both testified that it was the company practice before the strike to use temporary employees to cover non-permanent fluctuations in business, and it was the practice to extend their 30-day temporary period when the fluctuations lasted longer than were originally foreseen.

100. As noted above, defendants offered no testimony or evidence as to when the strike would have ended.

Defendants' Position:

101. At the outset, defendants took the position that no evidentiary hearing was required, and that "the replacement issue is just illegal in this situation completely 100%, not 99 but 100% illegal." (TR 6/15/79; p. 7)

They contended that there can be no replacements until the strikers first violate a Court order, and only upon their being contemptuous in their actions may the carrier start replacing. (TR 4/18/39; TR 6/15/79; p. 8)

The Court pointed out that if Defendants were correct in this contention, the carrier could be faced with situations wherein judges were simply not readily available such as when judicial conferences were being held. (TR 6/15/79; p. 10)

The Court noted that at the outset the carrier faced with such a strike has the problem of deciding whether to shut down or to do what it must to keep the doors open, whether or not a Federal judge is available. (TR 6/15/79; p. 14)

Defendants had no answer to the Court's example. (TR 6/15/79)

102. Defendants argued that Article XVI, paragraph (M) of the collective bargaining agreement warrants drawing a

positive inference in their favor. That Article reads as follows:

> "When an employee absents himself from his work for a period of three (3) days without the consent of the Company, other than because of proven sickness, he may be discharged."

Defendants, however, admitted that they did not know exactly what the clause meant in these circumstances and did not know when it comes in to play. (TR 10/15/79; p. 206)

They did state that it "seems" to be saying that if an employee is out for less than three days he cannot be discharged. (TR 10/15/79; p. 207)

The Court finds that the quoted article does not provide a source of relief to Defendants or the strikers in the circumstances of this case. Indeed, if anything, it would appear to provide the carrier with a remedy considerably more harsh than that of replacements, which the Company utilized with a minority of the strikers.

103. The IAM attempted to elicit testimony on cross examination to the effect that the newly-hired replacements were not so skilled, particularly in Ecuatoriana procedures, as was the work force which was on strike. The Court does not consider this to be a valid defense, particularly since the defendants were the parties responsible for the illegal strike which in turn necessitated the hiring of replacements under emergency conditions, and particularly inasmuch as the defendants gave no indication whatsoever to Ecuatoriana as to when, or even if, the strike would end. To the contrary, the communications received from defendants IAM and Cates indicated the strike was going to continue until those matters which the union considered to be disputes were settled.

104. The union agreed that it is disruptive to the union for members to be told a contemplated strike is illegal and they should not do it, but the reaction of the members is that they

have done this before and they know that it will work out all right and therefore they will strike. (TR 10/15/79; p. 204)

The union nevertheless contended that it would be undesirable to invest the union with sufficient control so that when it tells employees that if they engage in such activities they are exposing themselves to problems, the employees would follow the union's advice. (TR 10/15/79; p. 204)

The Court, however, stated that that should be the power which the union possesses, and the Court should assist the union in exercising it. (TR 10/15/79; pp. 204–205)

That rationale is affirmed here.

Plaintiff's Position:

105. Ecuatoriana's position was that the proper function of this Court was to determine whether the carrier engaged in mass discharges or hired replacements for the strikers. The carrier's position continued further that unless the replacements could be shown to have been hired because of unlawful, discriminatory reasons [there was no such evidence] then that ended the function of the Court.

The carrier took the alternative position that if the Court properly considers its function to go further and determine whether the number of replacements was necessary to enable the carrier to continue its operations and its service to the public, then the carrier has met that test, particularly when considered, not in hindsight, but in the emergency situation which existed at the time when the replacements were hired.

The carrier further contended that, absent discriminatory motivation, the Court should not substitute its judgment for the business judgment of the managers who were making the decisions at the time, particularly when they did not know when or if the strike would end.

Discussion:

106. The propriety or impropriety of the hiring of the replacements must be decided in light of the circumstances

as they existed at the time—here under emergency circumstances brought on by the illegal actions of the strikers themselves. The carrier was justified in replacing employees as properly needed, after being assured only hours earlier that there would be no strike, with regularly scheduled passenger and cargo flights already booked and being booked, with management personnel working long hours under adverse circumstances compounded by the frustrations of harrassing telephone calls, damage to property, threats of physical harm, false rumors of closure with the consequent necessity of protecting against losses to competitors, and the like—all without knowledge as to when the strike would end.

It is obvious that it would have been almost impossible for the carrier to continue to meet its cargo and passenger flight schedules, perform its necessary internal business functions and avoid losing customers and revenue to competitors, without hiring replacements. It is also obvious that the replacements did in fact perform to varying degrees the functions for which they were hired despite their being a minority of the full work force, and despite their being in part an inexperienced work force.

107. All replacements were hired permanently before the strike ended, on the dates, as shown on their contracts of employment, when the carrier intended to bind itself to a firm contract of employment for a specific job. It is therefore immaterial that some were not scheduled to, and thus did not actually, report for work until afterwards, or that some initially had to work intermittent schedules before beginning regular schedules. Under the circumstances in question, it is also immaterial that some replacements began even before responses to the April 10th letter could have been made.

108. The company's action in waiting to see if the mass walkout was only to be a lunch-time protest, in beginning the replacement process slowly and only after it became evident that the union was engaging in an indefinite strike, and

which was exacerbated by the appearance of pickets on the third day of the strike, and the ready willingness to take back strikers when replacements left, show that the carrier did not act precipitously.

109. An additional factor supporting the position of the carrier is that despite the circumstances of the strike, the carrier replaced only approximately 40% of its work force while continuing to meet its obligation to continue to serve the public. This indicates that the carrier struck a proper balance in its twin obligations to serve the public and to attempt reasonably to maintain the employer-employee relationship. This latter obligation must be viewed in the light of the actions of its employees which were designed to prevent, or had the effect of preventing, the carrier from carrying out the former obligation.

110. This Court, having found the facts as delineated herein, does not pass on the question of whether or not such misconduct was sufficient to deny present or future reinstatement to those strikers who engaged in such misconduct. This is so primarily because there has been no contention that any striker was denied replacement because of misconduct, and because a given set of facts may well involve a question of a violation of the collective bargaining agreement provisions which the parties may wish to have resolved by an arbitrator rather than by this Court.

The Test to be Used:

111. In the *National Airlines, Inc.* v. *International Ass'n of Machinists and Aerospace Workers*, 416 F.2d 998 (5th Cir., 1969), the Fifth Circuit Court stated that "principles developed in the Florida East Coast cases, [384 U.S. 238, 248, 86 S. Ct. 1420, 1425, 62 LRRM 2177 (1966); 5th Cir. 1964, 336 F.2d 172, 182, 56 LRRM 3009] supra, are applicable." Citing those Florida East Coast principles, the Court concluded that:

> **As indicated, replacements of the strikers, but not discharge would seem compatible with the need to restore service. It follows that those strikers whose positions**

> were filled . . . before the time the strike would have run its course are *not* entitled to reinstatement. . . .
>
> " . . . National was entitled only to hire replacements for the stikers in order to operate its Airline." (Emphasis in original; at 1007.)

The Court pointed out that "it falls to the lot of the District Judge to pass on what changes were in fact necessary for [the carrier] to continue to operate." The Court there was talking about unilateral departures "from other terms of the collective bargaining agreement," which are "reasonably" necessary, and not about the numbers of replacements which were hired.

Moreover, the carrier contends that refraining from discharging the strikers and replacing them instead, without more, satisfies the tests of "continuance of the employer's operations and the employer-employee relationship" *National*, at 1005) and "the need to restore service." (*National* at 1007).

In applying the applicable law to these facts, the Court concludes that a determination must be made as to the need (or lack of) for each replacement. I cannot agree with the carrier's position which appears to be simply that the act of replacement during the exigent circumstances concludes the question. If the test is what is reasonably necessary (in terms of replacements) to "operate its Airline" then the Court must look to the developed facts and make an appropriate determination.

112. The Court hereby, and for the reasons stated, finds that all of the replacements hired were properly hired and were necessary in order for the carrier to continue its operations, and to continue to serve the public, with the following exceptions.

A. It was not necessary for Ecuatoriana to replace the Cargo Department secretary, J. Montessinos, and the General Manager's secretary, Elvia Ferrer. This is so because

the carrier could have used a temporary secretarial agency to perform their secretarial duties during the tenure of the strike.

B. Neither was it necessary that the Sales Representative, Frank Rodriguez, be replaced, because it was not necessary to replace one sales representative to keep the airline operating; the carrier could have functioned under the circumstances without the services of one sales representative.

C. Neither was it necessary for the carrier to replace C. Sosa, the accounting clerk, since she had not yet actually begun to work in Miami when she was replaced; accordingly, there was no urgent necessity to replace her in order to continue operations.

Accordingly, strikers Montessinos, Ferrer, Rodriguez and Sosa should be returned to their former or substantially equivalent position or classification, unless they have obtained regular employment elsewhere or the carrier can show legitimate and substantial business justifications for not doing so. However, no replacement employee need be discharged unless the carrier determines that is necessary to do so in order to make room for the four returning strikers.

113. Under the circumstances, there will be no requirement that back pay be awarded these returning strikers. The strike was both illegal and violative of the collective bargaining agreement; it was the strikers who put themselves in the position of being out of work. To hold otherwise would allow the strikers to enrich themselves unjustly. However, a determination as to when pay for the improperly replaced employees should begin will remain for determination by the Court should the parties resolve this issue.

CONCLUSIONS OF LAW

The Strike Was Unlawful:

Defendants did not dispute that the strike was violative of the no-strike provisions of the collective bargaining agreement, did not follow the statutory procedures which must be

exhausted before employees may lawfully strike, and was in violation of the Act:

> "The heart of the Railway Labor Act is the duty imposed by Section 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the corporation of any carrier growing out of any dispute between the carrier and the employees.'" (*Brotherhood of Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369 (1969) 79 LRRM 2961, 2964)

Or, as stated in *National Airlines, supra* at 1003, note 3:

> ". . . [I]t would hardly serve the purpose of the Act to hold that the wildcat strikes, such as the strike involved here did not come within the statutory ban on self-help."

Judge Berger, while on the Circuit Court of Appeals for the District of Columbia Circuit, stated:

> "The legislation dealing with the relations between [carriers] and their employees shows congressional concern with the vital need to avoid work stoppages in the nation's transportation system . . . Congress recognized the right to strike, 'but postpones such actions until the successive procedures set up by the Act have been exhausted.'" (*Railway Clerks* v. *Retirement Board*, 239 F.2d 37 D.C. Cir., 1956)

The Carriers' Dual Obligation:

If this case had arisen under the National Labor Relations Act, there is substantial support for the proposition that Ecuatoriana could have discharged these strikers outright because of their participation in this unlawful strike. It is generally held that, under the NLRA, an employer may

lawfully discharge employees who engage in such "unprotected" conduct. (*National Airlines*, supra, at 1005).

Although the NLRA has been referred to for assistance in construing the Railway Labor Act, the former cannot be imported wholesale into the railway labor arena. One of the relevant differences is that:

> "The Railway Labor Act is more concerned with continuance of the employer's operations and the employer-employee relationship." (*National Airlines*; supra, at 1004).

It is the balancing of those two factors, which in a strike situation appear to be mutually exclusive, with which we are concerned here.

On the one hand, the obligation to maintain its operations is a strong one, imposed upon the carrier. Thus, even in a lawful strike occurring after all of the deliberately delay-inducing procedures of the Act have been exhausted, the carrier has the obligations to continue to operate. Certainly the duty and the right is at least as strong in an unlawful strike:

> "The carrier's right of self-help is underlined by the public service aspects of its business. 'More is involved than the settlement of a private controversy without appreciable consequences to the public.' Virginian Ry. v. Federation, 300 U.S. 515, 552. The Interstate Commerce Act places a duty on common carriers . . . to provide transportation. In our complex society, metropolitan areas in particular might suffer a calamity if . . . service for freight or for passengers was stopped . . . vital service might be impaired . . .
>
> " . . . [The carrier] owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies . . . " (*Railway Clerks* v. *Florida East Coast Railway Company*. 384 U.S. 238, at 247, 86 S.CT. 1420, at 1425, 62 LRRM 2177, at 2179)

Replacement Is the Proper Procedure:

On the other hand, the obligation to continue the employer-employee relationship remains extant. In the *National* case, the carrier felt that the unlawful nature of the strike gave it the right to continue its operations by *discharging* en masse its old work force in order to hire a new work force to take its place, thereby maintaining the employer-employee relationship.[1] The Fifth Circut Court held that it went too far, and that the proper procedure was to *replace* the strikers instead.

That, the Court said, strikes the proper balance between the two duties:

> The discharge of the strikers was not necessary to hire a new labor force. Under both the NLRA and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. e.g., *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L.ED. 1381; *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines, Inc.*, S.D.N.Y., 1962, 208 F.Supp. 182, 194, 50 LRRM 2929, aff'd 307 F.2d 510, 51 LRRM 2038. The hiring of replacements for the strikers would have been consistent with the attempt to restore service. The discharge of those best suited to carry on the carrier's business, on the other hand, would seem self-defeating: It prevented the possible restoration of the status quo should some or all of the strikers choose to return to work before enough replacements were hired . . .
>
> ". . . As indicated, replacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled . . . before the strike would have run its course are *not* entitled to reinstatement." (National Air-

[1] It would not matter that different individuals were the employees, because the "union remains the bargaining representative of all the employees in the designated craft, whether union members or not." (*Railway Clerks* v. *F.E.C. Ry.*, supra)

lines, supra at 1006; accord: *Florida East Coast Ry. Co.* v. *Railroad Trainmen,* 336 F.2d 172 (5th Cir., 1964) 56 LRRM 3009)

In the case at bar, the carrier replaced strikers rather than discharge them, and thus used the proper procedure to satisfy its dual obligations.

It Was Not an "Unfair Labor Practice" Strike:

Reference to the N.L.R.A. and cases is appropriate because under both statutes referred to the distinction between replacement and discharge applies, and under both statutes, a replacement employee is protected in his job upon the attempted return of the replaced striker.

It is true that the right may be defeated if the strike were caused "unfair labor practices" by the employer:

> "The protection given by the [National Labor Relations] Act to economic [i.e., strikers other than unfair labor practice strikers] strikers differs in scope from that given to participants in an unfair labor practice strike. [Citation omitted.] Economic strikers are not automatically entitled to reinstatement: '[A]n employer, guilty of no act denounced by the statute has . . . the right to protect and continue his business by filling with replacements' places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers upon the decision of the latter to resume their employment in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.' "
>
> "*NLRB* v. *Mackay Radio & Tel. Co.*, 1938, 304 U.S., 333, 345-346 [citations omitted.] However, the employer is not free to discharge striking employees and *then* to find permanent replacements for them." *NLRB* v. *Interna-*

tional Van Lines, 448 F.2d 905 (9th Cir. 1971), 78 LRRM 2299, 2303; rev'd in part on other grounds, 409 U.S. 48.

In reversing in part on other grounds, the Supreme Court was careful to point out that:

> "It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."

The Court also took care to repeat the principle that it was only:

> "[E]mployees striking in protest of an employer's unfair labor practice [who] are entitled, absent some contractual or statutory provision to the contrary, to unconditional reinstatement with back pay, "even if replacements for them have been made.' "

Here, there was no evidence of employer "unfair labor practices" which caused or prolonged the strike. Instead, the strike was one in which the strikers chose to ignore the no-strike clause, and the grievance-arbitration provisions to resolve any disputes which they may have felt existed, and sought to make it:

> "[I]mpossible for the [carrier] to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed." (*Florida East Coast Ry. Co.* v. *Railroad Trainmen*, 336 F.2d 172 (5th Cir. 1964), 56 LRRM 3009, 3014)

Such action imposes the obligation and the "right to operate" and the accompanying right to replace. (*Florida East Coast Ry. Co.* v. *Railroad Trainmen*, supra).

The Test of "Replacement":

On appeal after remand, the Fifth Circuit Court in *National Airlines* v. *Machinists*, 430 F.2d 957 (5th Cir., 1970) 74 LRRM 2833, stated that:

> "The permissible bounds of self-help was 'as defined here,' and we had defined it as not including mass

> discharges, but limited to employing replacements to the time the strike would have ended.
>
> On remand the District Judge considered the permissible limits of self-help to be an issue for him to determine *vel non*.
>
> The District Judge erred in his conception . . . he reached a conclusion precisely contrary to the holdings of this Court that self-help to continue service did not justify the mass discharge and that strikers were entitled to reinstatement unless replaced. The only matters for him to determine were when the strikers would have returned to work and who had been replaced as to that time, and to enter a direction that those not replaced be reinstated . . . " at 959.

The test, and thus the determination to be made by this Court was stated by the Fifth Circuit as follows:

> "In cases of replacement of a striker the critical time is when the arrangements with the replacement worker becomes fixed and irrevocable. Thus, if an employer has the intention to bind itself to a firm contract of employment, and the employer has accepted a specific job assignment, the replacement if 'hired' even though subsequently he may be divested of the job for a failure to pass medical or security clearance." *(National Airlines* at 961).

Here, each replacement was hired when the carrier entered into such arrangements, and certainly no later than when the various replacement employees signed their contracts of employment with the carrier.

Each of the replacements was hired before the strike ended, and thus all of the replacements satisfied this requirement.

As stated, supra, in the Findings of Fact, the Court perceives its role as including not only the strict determination of when the replacements were hired in relation to the end of the strike, but also, by implication, the determination

of whether the number of replacements hired were necessary "in order to operate its airline." *National Airlines,* supra 416 F.2d 998). It was on the basis of that more difficult test that this Court found the replacement hirings to be proper. A fortiori all the replacements met the simpler test of having been hired permanently before the end of the strike, which, under the circumstances of this case, was the same time as "when the strikers would have returned to work."

The Replacements Are Not to Be Discharged:

The carrier has no obligation to discharge any proper replacement at the termination of the strike, unless it be for other, unrelated reasons:

> "These principles are clearly applicable . . . it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay non-union replacements. As a corollary, BRT concedes that FEC has no obligation to fire any such replacement . . ." (*Florida East Coast Ry. Co.* v. *Railroad Trainmen,* supra)

It is recognized that this policy is also reflected under the National Labor Relations Act, by decisions such as *NLRB* v. *Mackay Radio & Tel. Co.,* 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L. ED. 1381, 10 L. Ed. 2d 308, 53 LRRM 2121.

> "The consequences of self-help are not necessarily confined to the period of strike. Thus, as Mackay Radio and Erie Resistor clearly held an 'employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers.' 373 U.S. 221 at 232, 53 LRRM 2121" *Florida East Coast Ry. Co.* v. *Railroad Trainmen,* supra

Preservation of the Status Quo:

Defendants initially contended that the status quo which is to be preserved is that state of affairs which existed *before* the strike. The Court rejected that contention because it would constitute a pre-disposition of the case.

Instead, the preservation of the status quo as provided by the Railway Labor Act, is the status which exists as of the time the strike would have ended; in this case, it is the status which existed as of the time the strike did end, inasmuch as it could not be told beforehand by Ecuatoriana when the strike would have ended. (*National Airlines,* supra, 430 F.2d 957).

The Matching of Replacements With Strikers:

Defendants contended at the outset that the carrier should have used seniority in deciding which strikers should be replaced, as replacements were hired. There is no such requirement in the law.

As found above, in utilizing the various procedures which it did for matching the names of strikers with the names of replacements, Ecuatoriana acted on the basis of its business judgment without anti-union animus as the dominant, or any, motive. (*NLRB* v. *Wells Fargo Armored Service Corp.,* ___F.2d___ (1st Cir., 1979) 101 LRRM 2209, 2211-2212).

That being so, the carrier may designate particular strikers for replacement on any basis, absent discriminatory motivation. (*Kennedy and Cohen of Georgia, Inc.*, 218 NLRB No. 178 (1975), 89 LRRM 1444, cited by the approval by the First Circuit Court in *NLRB* v. *Wells Fargo Armored Service Corp.*, supra.

Defendants' Contentions:

Defendants would have this court hold that the admittedly permissible form of self-help of hiring replacements can be utilized by a carrier faced with an illegal, unannounced strike only after the employees failed to comply with the District Court's orders to return to work. In support of that proposition, defendants cite language from the National Airlines case to the effect that:

> A different case would be presented if there had appeared any substantial likelihood that the strike could have been brought to a prompt end by further court proceedings. But the resort to the court's having

> proven ineffective, the carrier was permitted to resort to self-help in order to operate its business. (416 F.2d 1005)

The problems with that rationale are manifold. The quotation is taken out of context.

The language is part of an extended discussion of the impropriety of the use of mass discharges to replace the work force, along with a detailed exposition of the law and an application of the facts to the law.

The quotation is obiter dictum, and most significantly, the discourse containing the quotation cites to the NLRA cases and RLA cases which contain no such qualifications as in the obiter dictum. It ends with the same unqualified principles found in the cases which are cited:

> . . . [R]eplacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled either at the time of discharge or before the time the strike would have run its course are *not* entitled to reinstatement . . . (at 1007).

It then continues and adds a requirement which defendants here have failed to meet:

> The strikers, who are in a better position to cast light on this issue, should carry the burden to show when they would have returned to work . . . Strikers who had not been replaced at that time . . . are entitled to reinstatement. (at 1007).

Furthermore, the Circuit Court was careful to point out in prefatory language to the quote above that:

> 1. the strikers disregarded order of their union to return to work;
>
> 2. it was apparent that the union had lost control over the strikers;
>
> 3. an unmanageable work stoppage had occurred and repeated attempts by the union had failed to restore the status quo.

In this case, it was uncontroverted, and indeed agreed by defendants that the union at no time after the strike began made any attempt to have the strikers return to work, that there were no orders of the union to return to work for the strikers to disregard, the union had not only not lost control over the strikers, but declined for its own political reasons to attempt to order them to go back to work. Moreover, the testimony of union representatives Cates was to the effect that what had occurred here was the same type of "master plan" which he had used successfully in the past with other carriers and which contemplated the strike's continuing until the carrier came to terms with the union.

Moreover, the defendants put on no evidence, other than the statements of counsel made after the fact, that the union intended to terminate or that there would any substantial likelihood that, the strike would have been brought to a prompt end by court proceedings. Indeed, as noted, the only evidence as to when the strike would have ended was to the effect that the strike would end when the carrier capitulated to the union's demands. The only evidence relating to the court proceeding and the strike was to the effect that the union representatives were attempting to persuade the New York employees to engage in a subterfuge and to use a sick-out to bring additional pressure against the carrier. The plan was for the New York strikers to escape any liability for their unlawful deeds by deliberately setting up beforehand to strike *until*, or if, the union or other strikers decided to accede to a court order.

It simply cannot be said that a carrier faced with an illegal strike under these circumstances should have to shut down its operation for whatever period of time it took lawyers and the courts to act, even assuming a favorable decision. To enunciate such a principle of law would fly in the fact of the Supreme Court's directions that every carrier has "its duty to continue to serve the public." (*Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry. Co.*, 384 U.S. at 247).

Moreover, such a result cannot be squared with the Supreme Court's admonition in that case that the courts must not allow:

> "The practical effect of that conclusion . . . to bring the [carrier's] operations to a grinding halt."

On the basis of the foregoing Findings and Conclusions, the Court

ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. Defendants' Counterclaim is dismissed and Defendants take nothing;

2. The preliminary injunctions previously entered herein remain dissolved and are not made permanent;

3. As delineated herein, the replacements properly hired are considered permanent hires, displacing the strikers replaced;

4. Judgment is hereby entered in favor of the plaintiff and against the defendant.

5. Costs which are taxable shall be entered for plaintiff upon appropriate motion.

DONE AND ORDERED in Chambers at Miami, Florida this 15th day of April, 1980.

WM. M. HOERDER
U.S. District Judge

Copy furnished to
all counsel of record

A-92

Supreme Court of the United States

No. A-757

EMPRESA ECUATORIANA de AVIACION, S.A.,

Petitioner,

v.

DISTRICT LODGE NO. 100, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 29, 1983.

/s/ LEWIS F. POWELL
Associate Justice of the Supreme Court of the United States

Dated this 11th day of March, 1983

No. 82-1916

in the Supreme Court of the United States

EMPRESA ECUATORIANA DE AVIACION, S.A.,
Petitioner,

vs.

DISTRICT LODGE NO. 100,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
J. G. CATES AND JULIANA MENOSCAL,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE DISTRICT COURT'S ACTION INQUIRING INTO THE NECESSITY FOR EACH INDIVIDUAL REPLACEMENT HIRED DURING A WORK STOPPAGE UNDER THE RAILWAY LABOR ACT WAS A PROPER EXERCISE OF ITS EQUITABLE POWERS IN LIGHT OF ITS STATUTORY OBLIGATION PURSUANT TO THE RAILWAY LABOR ACT TO ENSURE THE CONTINUANCE OF THE EMPLOYER-EMPLOYEE RELATIONSHIP AND TO AVOID INTERRUPTION OF SERVICE TO THE PUBLIC.[1]

II

WHETHER A DISTRICT COURT, PURSUANT TO ITS EQUITABLE POWERS TO EFFECTUATE THE PURPOSES OF THE RAILWAY LABOR ACT, MAY AWARD BACKPAY, SENIORITY AND OTHER EMPLOYMENT RELATED BENEFITS TO EMPLOYEES WHOSE EMPLOYER IMPROPERLY DENIED THEM REINSTATEMENT TO THEIR EMPLOYMENT.

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[1]This issue has been rendered moot by the Petitioner's reinstatement offers to each of the four employees whom the District Court found to be improperly replaced. See Argument II, *infra*.

III

WHETHER EMPLOYEES WHO WERE PROPERLY REPLACED DURING A LABOR DISPUTE UNDER THE RAILWAY LABOR ACT ARE ENTITLED TO BE PLACED ON A PREFERENTIAL HIRING LIST TO BE REHIRED WHEN THEIR REPLACEMENTS LEAVE OR WHEN A SIMILAR VACANCY OCCURS WHEN THE EMPLOYER SPECIFICALLY INFORMED THEM THAT THEY WOULD BE PLACED ON A PREFERENTIAL HIRING LIST AND THE EMPLOYER TESTIFIED, WITHOUT QUALIFICATION, AS TO THAT OBLIGATION BEFORE THE DISTRICT COURT.

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COUNTERSTATEMENT OF THE CASE

The Respondents, DISTRICT LODGE 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, J. G. CATES and JULIANA MENOSCAL (hereinafter District 100 or Union) cannot accept Petitioner's Statement of the Case. The decision of the United States Court of Appeals for the Eleventh Circuit, due to the fact that it involved the exercise of the District Court's equitable powers under the Railway Labor Act (hereinafter RLA or Act), turned upon the specific facts involved in the case. Several facts important to a clear and complete understanding of the case were not contained in the Petitioner's Statement of the Case. Accordingly, the Union is compelled to set forth its Counterstatement of the Case.

At noontime, on Monday, April 9, 1979, a substantial number of employees of Empresa Ecuatoriana de Aviacion (hereinafter Ecuatoriana or carrier), without authorization from the Union, ceased working, wrote sick on their time cards and departed from their place of employment. The walkout was apparently in response to a number of problems, the culminating event being the institution of a training program which the employees suspected, contrary to the representations of the carrier, was an attempt to cross utilize employees in violation of the Collective Bargaining Agreement (hereinafter CBA).[2]

On that same afternoon, April 9th, or early the following day, Tuesday, April 10th, the General Manager

[2]The other problem being the carrier's failure to process and arbitrate grievances in the manner prescribed in the CBA.

of the carrier authorized his managers to begin permanently replacing the employees participating in the strike. The managers, including the General Manager, were well versed in the hiring of replacements as the managers, several days before the strike, had conferred for several hours with one of the carrier's many attorneys (Greene). At that meeting, the attorney instructed the managers that in the event of a strike, the carrier should permanently replace the strikers and he had drafted all the documents necessary to implement that replacement of strikers. There was no instruction and/or discussion from the attorney concerning the carrier "running" to Federal Court to seek an injunction restoring the status quo ante to continue the operation of the airline. At the same time, on April 10th, as the managers were hiring replacements, the General Manager met with two of the carrier's other attorneys (Manas and Marcus) who, using the papers, letters and contracts of employment drafted by Attorney Greene, before he left on vacation, drafted letters of replacement. These letters, which were not postmarked until that afternoon, were not received by the employees until Wednesday, April 11 or Thursday, April 12, well after the carrier had already issued an order to replace and did replace the strikers. The letters of replacement did not state that the employees should return to work by a certain day or they will be replaced. They merely said that steps were being taken to replace them. No other communication with the strikers was attempted by the carrier to secure their return to work. On that same day, Tuesday, April 10, while the carrier had still not filed pleadings in District Court seeking an injunction enjoining the strike and restoring the status quo, the

carrier's General Manager ordered another of the carrier's attorneys in New York to file a complaint for damages against the Union in New York.

On Wednesday, April 11, in the afternoon, while the carrier was continuing to replace the strikers, the carrier, for the first time, sought to utilize the injunctive power of the District Court in order to enjoin the strike. The Court, upon this application, promptly scheduled an emergency hearing for the following afternoon, Thursday, April 12, 1979.

On Thursday, April 12, the Court, after argument of counsel and based on the pleadings, entered its Temporary Restraining Order, *inter alia*, enjoining the Defendants from engaging in a strike, ordering them to return to work for their next regularly scheduled shift, and enjoining the carrier from failing to properly process grievances. The Order did not, despite requests by the Union, restore the status quo ante to the time prior to the strike and concomitantly prior to the carrier's permanent replacement of strikers.[3] The Court further retained jurisdiction for all purposes including the issues concerning replacement as based on the representations of the carrier, the issue of replacements was not ripe for determination.

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[3]The fact that the carrier, prior to seeking injunctive relief from the District Court, replaced any of the employees was raised by the carrier's attorney but he stated that the extent of the replacement was ". . . an instance of one or more replacements" not the replacement of approximately 60%-70% of those who participated in the strike.

On Friday, April 13, the employees, pursuant to the Court Order, returned to work only to be told by management that they had been permanently replaced. In all, approximately 60%-70% of those who engaged in the walkout were replaced. The carrier, upon informing the employees that they had been replaced also informed them that they would be afforded the same or similar positions with the carrier when vacancies occurred in the work force.[4]

On that same day, Friday, the Union in response to the carrier's radical change in the composition of the work force, to-wit: replacement of 35-39 of the 50-52 employees who participated in the strike, a fact not disclosed at the hearing less than 24 hours before, filed its Motion for Emergency Relief and Rule to Show Cause requesting that the carrier cease and desist from its illegal replacement of employees; and that the Court restore the status quo ante as of that time period prior to the permanent replacement of the strikers. On that same day, the Court entered its Rule to Show Cause scheduling a hearing for April 19 concerning the issue of replacements. The Court, after argument of counsel, refused to restore the status quo ante and denied reinstatement to all the replaced employees. Instead, the Court scheduled hearings to determine the reasonableness of the carrier's actions in hiring replacements.

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[4]Ecuatoriana, through its attorneys, also advised the District Court, on at least two occasions, that the replaced strikers would retain residual rights to their jobs and would be placed in a preferential hiring position.

After several days of hearing the Court entered its Findings of Fact and Conclusions of Law and held that the carrier had the right to replace strikers where necessary to continue its operation. The Court also held that, to protect the goal of continuance of the employer-employee relationship, it had to pass on the necessity of each replacement and determined that all but four replacements were necessary under the facts and circumstances thereby deeming these replacements as permanent hires displacing the former employees. The District Court did not address the issue as to the future employment rights (preferential rehiring rights) of those displaced employees.

With respect to the four employees wherein the District Court found them to be improperly and/or unnecessarily replaced by the carrier, the Court ordered them reinstated to their employment but denied them backpay and employment related benefits.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the Court, *inter alia*,[5] affirmed the authority of the District Court to scrutinize the necessity of each replacement pursuant to its equitable power to ensure satisfaction of the goals and objectives of the RLA. The Court, however, reversed that portion of the District Court's decision which declined to award

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[5]The Court of Appeals also affirmed, under the circumstances of this case, the right of the carrier to replace strikers where necessary to its operation. It declined to lay down a per se rule that any time a minor dispute is in progress and the union strikes, the carrier may replace strikers before seeking equitable relief. Neither party, however, seeks review of this portion of the Eleventh Circuit's Order.

backpay and other employment related benefits to those strikers who were unnecessarily replaced. Based upon the District Court's equitable discretion to ensure compliance with the goals of the RLA, the Court held that those unnecessarily replaced employees were entitled to all remedies which normally accompany reinstatement, including backpay and other employment related benefits. The Court also held that strikers were entitled to be placed on a preferential hiring list to be rehired when the replacements quit or when a similar vacancy arose.

ARGUMENT

I

THIS PETITION PRESENTS NO IMPORTANT ISSUE WORTHY OF REVIEW BY THIS COURT.

The decision of the Court of Appeals neither conflicts with that of other federal or state courts nor does it involve a departure from the accepted and usual course of judicial proceedings requiring this Court's exercise of its power of supervision. Further, it does not involve any important question of federal law which has not been, but should be, settled by this Court. Rather, the decision involves the application of legal and equitable principles, which have, time and time again, been utilized by the courts in order to effectuate purposes of the RLA, to the narrow and particular facts and circumstances of this case. Accordingly, in view of the fact that the decision of the Court of Appeals rests upon the intertwining of particular and specific facts with well established legal and equitable principles, it is thereby of importance only to the particular litigants involved and does not warrant review by this Court on certiorari. See *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498 (1951); *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923); *Fields v. United States*, 205 U.S. 292 (1907).

The Petitioner's request for this Court's review of the decision of the Court of Appeals is based upon its unfounded and improper application of the fundamental premises and principles of the National Labor Relations Act (hereinafter NLRA), 29 USC §151 et. seq. to the

instant case, arising under the RLA. Although this Court has on occasion referred to the NLRA for assistance in construing the RLA, see *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Brotherhood of Railroad Trainmen, etc. v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), this Court has consistently emphasized the many fundamental differences between the respective Acts:

> "The relationship of labor and management in the railroad industry has developed a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act. *Brotherhood of R.T. v. Chicago R. & I. R. Co.*, 353 U.S. 307 at 32 N.2 (1957).

As a result of those fundamental differences, this Court has consistently cautioned against wholesale importation of NLRA principles into the RLA:

> "It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Jacksonville Terminal Co., supra*, at 383.

See also *National Airlines, Inc. v. International Ass'n. of Machinists and Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969); *cert. denied* 400 U.S. 992 (1971) (hereinafter NAL I); *United Ind. Workers of Seafarers I.U. v. Board*

of Tr. of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), *cert. denied* 397 U.S. 926 (1970).

In the instant case, the Petitioner in its zeal to request this Court to review this case based upon NLRA principles, has overlooked one of the fundamental principles, not found under the NLRA but strongly embraced by the RLA, the policy of continuance of the employer-employee relationship. In comparing the relevant differences between the NLRA and the RLA, Judge Wisdom of the Fifth Circuit Court of Appeals succinctly stated:

> ". . . the Railway Labor Act is more concerned than the National Labor Relations Act with continuance of the employer's operations *and the employer-employee relationship.* This is evidenced by the fact that while bargaining is the first and last step under the NLRA, it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved. *Galveston Wharves, supra* at 329, 330. (Emphasis added)

This statutory purpose of the Act, the continuance of the employer-employee relationship, along with its twin purpose, the encouragement of collective bargaining to avoid interruptions to commerce were, with respect to all three Questions Presented for Review, properly balanced by the Court of Appeals so as to effectuate the policies of the RLA. It recognized the carrier's right, when confronted with an illegal strike, to have replacements which were necessary to fulfill its obligation to operate. Concomitantly, it preserved the continuance of the employer-employee relationship by scrutinizing

each and every replacement but only to the extent that the relationship, strained by an illegal strike, did not interfere with the carrier's obligation to the public to operate. Where the twin policies conflicted, the Court of Appeals opted for the carrier's right to permanently replace the striking employees in order to operate. Additionally, it preserved the continuance of the employer-employee relationship by providing for all those employees necessarily replaced during the work stoppage to be placed on a preferential hiring list to be offered reinstatement when their replacement quits or when a vacancy arises.

The Petitioner's reason for requesting review by this Court, to-wit: to establish a consistent legal framework within which employers confronted with an illegal strike under the RLA may respond, is improperly premised upon an NLRA analysis of this case arising under the RLA.

The Petitioner's failure to address, in its Petition, the statutory policy of continuance of the employer-employee relationship and that policy's role in the decision of the Court of Appeals significantly distorts the importance of Petitioner's Questions Presented for Review. The "consistent framework" upon which the Petitioner bases its request for review is, in fact, embodied within the decision of the Court of Appeals. The careful balancing by the courts of the RLA's twin statutory objectives including the continuance of the employer-employee relationship, in light of the specific facts and circumstances of each case, provides the "framework" contemplated by Congress in enacting the RLA and consistently followed by the courts. See Argument III, infra.

Accordingly, the Petitioner presents no important question of federal law requiring decision by this Court.

II

THE DECISION OF THE COURT OF APPEALS IS, IN PART, MOOT.

The Petitioner, in its first Question Presented for Review, seeks this Court's review of the question as to whether the District Court abused its discretion by scrutinizing the necessity for each replacement hired by a carrier confronted with an illegal strike under the RLA. The District Court held, after scrutinizing the necessity for each replacement, that four employees (Montessinos, Sosa, Rodriguez and Ferrer) were improperly replaced and were entitled to reinstatement to their employment with the carrier. The Petitioner cross appealed, *inter alia*, on that issue but later informed the Court of Appeals, prior to oral argument, that it would not argue either (a) that the District Court erred in finding that Sosa, Ferrer and Montessinos were not necessary, or (b) that the District Court erred in substituting its judgment for that of the carrier concerning the aforestated. The reason given by the Petitioner was that the claims were moot by virtue of offers of reinstatement. The Petitioner, however, did emphasize that the aforestated issues would be argued only with respect to Rodriguez, the fourth replacement. (Resp. App. at 1-4). The Court of Appeals, in its opinion, stated, with respect to the claims of Montessinos, Sosa and Ferrer:

> "Four strikers, Sosa, Ferrer, Montessinos and Rodriguez, were held unnecessarily replaced.

> Sosa, Ferrer and Montessinos were offered reinstatement; Montessinos accepted, and the other two refused. The claims of these three for reinstatement are thus moot, and the airline has eschewed review of the necessity-of-replacement issue with respect to them." (Petitioner's App. at 15.)

Since the decision of the Court of Appeals, the Petitioner has offered reinstatement to Rodriguez in compliance with, *inter alia*, the decision of the District Court, affirmed by the Court of Appeals. Moreover, Ecuatoriana, as part of an overall settlement of the claim of Rodriguez, agreed that:

> ". . . in the event that it files a Petition for Writ of Certiorari in the United States Supreme Court seeking review of the decision of the Eleventh Circuit Court of Appeals in Case No. 80-5349, Ecuatoriana shall not seek review of any portion of said decision dealing with the replacement, reinstatement, termination, backpay entitled or any other issues relating to Frank Rodriguez." (Resp. App. at 6,7.)

Accordingly, with the offer of reinstatement to Rodriguez and subsequent final settlement of all his claims, each and every employee whom the District Court held to be improperly replaced has been offered reinstatement by the Petitioner. The parties, thus, lack a legally cognizable interest in the outcome of the issue and, therefore, the Petitioner's first Question Presented for Review is moot. See *Boston Firefighters v. Boston Chapter, NAACP*, ____ U.S. ____, 51 U.S.L.W. 4566 (1983); *Powell v. McCormack*, 395 U.S. 483, at 496 (1969);

Fla. Board of Business Regulation, NLRB, 605 F.2d 916 (5th Cir. 1979).

III

THE DECISION OF THE COURT OF APPEALS IS CORRECT IN THAT IT IS BASED UPON WELL ESTABLISHED LEGAL AND EQUITABLE PRINCIPLES.

Assuming arguendo that the Petitioner's first Question Presented for Review is not moot, the decision of the District Court affirmed by the Court of Appeals regarding its discretion to scrutinize the necessity of each replacement is correct.

The law is well settled that district courts whose injunctive power have been invoked in a labor dispute under the RLA are constrained to utilize their equitable powers to fashion relief which is in compliance with the policy of the Act. *NAL I, supra; Galveston Wharves*, supra. Under the RLA, the equitable powers of the courts are guided by the twin policies of the Act, the continuance of the employer-employee relationship and the encouragement of collective bargaining in order to avoid interruptions to commerce. Ibid.

The District Court, in the instant case, acted well within its equitable discretion. It undertook extensive and meticulous fact finding in order to determine whether each replacement hired was necessary for the continued operation by the carrier. In doing so, it ensured the carrier's right to operate while, at the same time, ensured the integrity of the employer-employee relationship.

The Petitioner's argument herein, as it was in the courts below, is based upon a fundamental misunderstanding of the RLA. The carrier's right to replace in *illegal strike situations* (minor disputes) does not emanate from the same origin as the right to replace in *lawful strike situations* (major disputes).[6] In lawful strike situations both sides have exhausted the mandatory statutory negotiations, mediation, status quo provisions of Section 6, 45 USC 156 and thus may utilize self help. On the other hand, in unlawful strike situations, the right to replace emanates from the district court's

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[6]Justice Rutledge, in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945) explained the distinction between major and minor disputes under the RLA:

> "The first (major dispute) relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. *They look to the acquisition of rights for the future*, not to assertion of rights claimed to have vested in the past.
>
> The second class (minor disputes), however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g. claims on account of personal injuries. *In either case the claim is to rights accrued, not merely to have new ones created for the future.*" Id. at 723 (Emphasis added)

exercise of its equitable powers to effectuate the RLA's twin statutory objectives rather than from the status quo provisions and, consequently, self help is not available to either party (Petitioner's App. at 12). *Detroit & Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142 (1969); *Jacksonville Terminal, supra; NAL I, supra.* If this Court was to subscribe to the Petitioner's argument that in unlawful strike situations a court may not scrutinize the necessity of each replacement but must defer to the business judgment of the carrier, it would be "turning the RLA on its head" by judicially creating a right of self help in situations where none was intended.

Accordingly, the District Court's scrutinizing of each and every replacement under the facts and circumstances of this case was a proper exercise of its equitable power in that it preserved the integrity of the RLA.

In addition to the propriety of the decision concerning the District Court's scrutinizing of each replacement, the Court of Appeals' award of backpay and other employment related benefits to the four unnecessarily replaced employees is also correct.

The law is well settled that in the area of reinstatement rights and that which constitutes appropriate relief for improper and/or illegal actions under the RLA, the courts have adopted the "make whole remedy", to-wit: an award of backpay and other employment related benefits to the injured parties. *NAL I, supra; Galveston Wharves, supra.*

In the instant case, the District Court, pursuant to its equitable powers and the balancing of the goals of the RLA, properly found that four employees were unnecessarily replaced and that the carrier improperly refused to reinstate them when they attempted to return to their employment. The District Court, however, improperly declined to award them backpay and other employment related benefits for the period commencing from the time they were improperly denied reinstatement until the carrier's subsequent offer of reinstatement based upon reasons of unjust enrichment and punishment for participation in an illegal strike. The Court of Appeals, however, properly rejected the reasoning of the District Court and awarded the four unnecessarily replaced employees backpay with all emoluments of employment for the aforestated period.

The decision properly effectuates the "make whole" remedy well established under the RLA.[7] In *Galveston Wharves, supra*, where employees were improperly furloughed in violation of the status quo, the Court set forth its rationale for an award of make whole relief to the affected employees, at 325:

> "The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the Carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act."

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[7]The Petitioner's reliance upon NLRA cases is, as heretofore argued, misplaced. See Argument I, *supra*.

Moreover, in *National Airlines v. International Ass'n. of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970) (hereinafter NAL II), where employees were engaged in an illegal strike, the Court held that the strikers illegal conduct and/or wrong was not a bar either to their reinstatement or to an award of backpay and other employment related benefits.

An award of backpay and other employment related benefits to those employees unnecessarily replaced and improperly denied reinstatement properly compensated those employees for their losses incurred as a result of the carrier's improper refusal to return them to their jobs. The award of backpay under the facts and circumstances constituted an exercise of judicial authority deeply rooted in judicial precedent.

Finally, the decision of the Court of Appeals concerning the replaced employees right to be placed on a preferential hiring list is correct in that it is based upon the evidence adduced at trial and well established legal and equitable principles utilized by the courts in order to ensure attainment of the purposes of the RLA.

This Court, in reviewing this issue, need only review the evidence adduced at trial, exhibits introduced into evidence, and representations by the Petitioner to the District Court in order to affirm the propriety of the decision of the Court of Appeals.

Ecuatoriana on several occasions by virtue of the testimony of its managers specifically voluntarily undertook the obligation to place all replaced employees on a preferential hiring list. It did so, both at the time when the employees attempted to return to their jobs

after the District Court enjoined the strike and ordered them to return to work and, again, several weeks later after grievances were filed by the replaced employees.[8] Moreover, on several occasions, the carrier's attorneys informed the District Court that these replaced employees maintained a preferential hiring position to be reinstated when their replacements left or vacancies occurred.

In addition to the fact that the obligation to maintain a preferential hiring list was specifically undertaken by Ecuatoriana, that obligation was also mandated by one of the twin statutory objectives of the RLA, the continuance of the employer-employee relationship. *NAL I, supra; Galveston Wharves, supra.*[9] It is only through the maintenance of that list that the courts can respect and promote the continuance of the employer-employee relationship. Moreover, without this hiring preference, there would be a severing of that relationship and, accordingly, the concept of replacement would be

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[8]The Court of Appeals, in another context, recognized this obligation undertaken by Ecuatoriana:

> "When the strike was ended by the TRO, strikers who had not been replaced were reinstated, no one was denied reinstatement because of misconduct, strikers replaced were told that if their replacements left or other positions opened up they would be recalled, and pursuant to this promise several strikers were reinstated after April 13." Petitioner's App. at 11.

[9]As was heretofore argued, the Petitioner's argument regarding this Question for Review is misplaced in that it improperly relies upon cases under the NLRA and fails to address the impact of RLA objective of continuance of the employer-employee relationship upon the instant case. See Argument I, *supra.*

indistinguishable from discharge—a result which the courts in cases arising under the RLA have specifically proscribed. See *NAL I, supra.*

CONCLUSION

The decision of the Court of Appeals is premised upon well established legal and equitable principles which, when applied to the unique facts and circumstances of this case, effectuates the purposes of the RLA. The propriety of this decision is firmly established and, accordingly, certiorari review by this Court is not warranted.

Respectfully submitted,

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Attorneys for Respondents

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari was mailed (Prepaid First Class) on this 29 day of June, 1983, to: Harry Sangerman, Esquire, c/o McDermott, Will & Emery, 111 West Monroe Street, Chicago, Illinois, 60603.

MANNERS, AMOON & TUCKER

By: /s/ George H. Tucker
GEORGE H. TUCKER

Appendix

TABLE OF CONTENTS

All references made to the Respondents' Appendix in this Brief will be referred to as: Resp. App. at ____.

[RECEIVED NOV 25 1981]

November 24, 1981

Clerk of the Court
United States Court of Appeals
For the Eleventh Circuit
56 Forsythe Street, N.W.
Atlanta, Georgia 30303

Re: The United States Court of Appeals For the 11th Circuit, Case No. 80-5349 District Lodge 100, IAMAW et al v. Empresa Ecuatoriana de Aviacion

Dear Mr. Zoller:

This is to notify the Court that Ecuatoriana will not argue concerning the secretaries (Montessinos and Ferrer) nor the accounting clerk (Sosa). We also will not argue that the District Court erred in finding the three replacements were not necessary, nor that the District Court erred in substituting its judgement for the Carrier's, concerning the three.

The reason for this is that one of the three (Montessinos) has been reinstated and two of the three (Ferrer and Sosa) refused reinstatement despite a bona fide offer from the Carrier, and so the questions concerning them are moot.

Ecuatoriana intends to argue concerning the remaining salesman (Frank Rodriguez) because that issue is not moot.

Thank you for your cooperation.

Very truly yours,

/s/ ALAN DOUGLAS GREENE

Alan Douglas Greene
Attorney for Empresa Ecuatoriana de Aviacion

cc: Joseph P. Manners, Esq.
George H. Tucker, Esq.

[RECEIVED JUL 26 1982]

July 22, 1982

Mr. Joseph P. Manners, Esquire
General Counsel, International Association
of Machinists and Aerospace Workers
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

No. 80-5349
EMPRESA ECUATORIANA DE AVIACION, S.A.
v. DISTRICT LODGE NO. 100, Et Al.

Dear Mr. Manners:

It has come to my attention that appellee's counsel, Alan Greene, wrote on November 24, 1981, to inform the court that the airline considers moot the claims of Ms. Montessinos because she has been reinstated and the claims of Ms. Ferrer and Ms. Sosa because they refused reinstatement. The file containes no response by appellants to the letter.

Appellants are requested to file a response within ten (10) days from today on whether the claims of Ms. Montessino, Ms. Ferrer and Ms. Sosa are moot in whole or in part.

Respectfully,

NORMAN E. ZOLLER, Clerk

By /s/ WARREN A. GODFREY
Warren A. Godfrey, Chief
Judicial Support Division

WAG: rcn

cc: Mr. George H. Tucker
Mr. Alan Greene

July 28, 1982

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Attn. Warren A. Godfrey

Re: Empresa Ecuatoriana de Aviacion, S.A.
vs. District Lodge No. 100, et al.
No. 80-5349

Dear Mr. Godfrey:

This letter is in reference to your letter of July 23, 1982 concerning Appellee's counsel statement that the airline considers moot the claims of Ms. Montessinos because she has been reinstated and the claims of Ms. Ferrer and Ms. Sosa because they refused reinstatement. That statement is true—but must be clarified because there are several claims concerning these persons.

The claims to which Mr. Greene is referring concerning Montessinos, Sosa and Ferrer are the *claims of Ecuatoriana* raised in *its* Cross Appeal, Issues VI and VII. (See letter of Greene dated November 24, 1981 and Brief of Appellee-Cross Appellant, Empresa Ecuatoriana de Aviacion, Issues VI and VII, pp. 44-50.)

With respect to those issues, Ecuatoriana, in its Cross Appeal, sought to reverse the Order of the District Court reinstating Sosa, Montessinos and Ferrer. However, Ecuatoriana rather than staying the Order of the District Court, instead elected to comply with said Order by

offering those three individuals reinstatement to their jobs. Ferrer and Sosa refused reinstatement and thus, their claims as to reinstatement with Ecuatoriana pursuant to the District Court Order (those involved in Cross Appeal Issues VI and VII) are moot. (See also Reply/Opposition Brief of Union Defendants, Footnote 8, p. 18.)

Montessinos, on the other hand, accepted the offer of reinstatement made by Ecuatoriana pursuant to the District Court Order. Ecuatoriana, however, by notifying the Court that it would not argue its Cross Appeal issue(s) concerning Montessinos thus rendered Cross Appeal Issues VI and VII moot with respect to Montessinos.

Despite the mootness of Ecuatoriana's Cross Appeal, Issues VI and VII, concerning Sosa, Ferrer and Montessinos, there still remain issues involving Sosa, Ferrer and Montessinos which are *not moot* and which were raised on appeal by the Union Appellants (see Brief of Appellants, Issue V, p. 45-50). The District Court ordered that the three aforestated employees be reinstated but denied them back wages and other employment related benefits for the period during which they attempted to return to work after the strike, April 13, 1979, and the date of the District Court Order, April 15, 1980. Accordingly, this issue with regard to Ferrer, Montessinos and Sosa is *not* moot and remains for determination by this Court.

If there are any further questions regarding the claims of Montessinos, Ferrer and Sosa, please advise.

Sincerely,

JOS. P. MANNERS and
GEORGE H. TUCKER

GHT:cz

cc: Jos. P. Manners, Esquire
Alan Greene, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-1083-CIV-EBD

DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Plaintiff,

vs.

EMPRESA ECUATORIANA DE AVIACION,

Defendant.

COMPLIANCE/SETTLEMENT AGREEMENT

The parties to this Agreement, Frank Rodriguez, District 100, International Association of Machinists and Aerospace Workers, (hereinafter IAM or Union), and Empresa Ecuatoriana de Aviacion, (hereinafter Ecuatoriana), in order to finally resolve their claims concerning Frank Rodriguez arising out of the District Court's Findings of Fact and Conclusions of Law in United States District Court Case No. 79-1795-Civ-WMH, Southern District of Florida, the same being subsequently appealed to the Fifth Circuit Court of Appeals Case No. 80-5349, to comply with the Final Judgment and Orders of the United States District Court, Southern District of Florida in Case No. 81-1083-Civ-EBD, and to resolve all other claims arising from the employment and termination of Rodriguez, STIPULATE AND AGREE as follows:

1. Ecuatoriana shall fully comply with the Award of the Arbitrator dated April 13, 1981 regarding the termination/grievance of Rodriguez and the Final Judgment of the District Court in Case No. 81-1083 dated October 12, 1982 except to the extent that Rodriguez waives reinstatement to any employment with Ecuatoriana and does hereby waive all future rights with respect to employment with Ecuatoriana.

2. In accordance with the Arbitration Award and Final Judgment of the Court, Case No: 81-1083-CIV-EBD, Ecuatoriana shall compensate Rodriguez and make him whole for all backpay and employment related benefits less any deductible interim earnings. The amount of backpay that Rodriguez shall be compensated shall be Twenty Thousand Five Hundred Seventy-Six Dollars and 57/100 ($20,576.57) less applicable payroll deductions and less Two Thousand Three Hundred Eighty-Six Dollars and 51/100 ($2,386.51) which Ecuatoriana shall, on behalf of Rodriguez, pay to the District 100 IAMAW Income Security Fund and less Three Thousand Four Hundred Twenty-Seven Dollars and 20/100 ($3,427.20) which Ecuatoriana shall pay on behalf of Rodriguez to the IAMAW Pension Fund. It is hereby agreed and understood that Ecuatoriana shall take all steps necessary to advise the IAMAW Pension Fund that Rodriguez shall be given past service credit for pension purposes from April 12, 1979 through the date of the execution of this Agreement in accordance with the April 1981 Award of the Arbitrator and the October 12, 1982 Final Judgment of the District Court in Case No. 81-1083-Civ-EBD. With the addition of the aforestated pension service credit, it is hereby agreed that Rodriguez is fully vested in said IAMAW Pension Fund and said vesting is a condition precedent to this Agreement. In

the event that Rodriguez is not fully vested in the IAMAW Pension Fund then Ecuatoriana agrees to compensate directly to Rodriguez the amount of the aforestated contribution, Three Thousand Four Hundred Twenty-Seven Dollars and 20/100 ($3,427.20).

3. Ecuatoriana shall withdraw its Notice of Appeal in the above-captioned matter presently before the Eleventh Circuit Court of Appeals Case No. 82-6115 and shall, now and forever, waive its right to contest the Final Judgment and/or Orders of the Court in Case No. 81-1083-Civ-EBD. Ecuatoriana further agrees, that in the event it files a Petition for Writ of Certiorari in the United States Supreme Court seeking review of the decision of the Eleventh Circuit Court of Appeals in Case No. 80-5349, Ecuatoriana shall not seek review of any portion of said decision dealing with the replacement, reinstatement, termination, backpay entitlement or any other issue relating to Frank Rodriguez.

4. Ecuatoriana shall pay to the Union its attorneys fees incurred in the prosecution of the aforestated case in the United States District Court, Southern District of Florida, in the amount of Eight Thousand Two Hundred Fifty Dollars ($8,250.00).

5. Rodriguez shall execute any documents, including a release of liability, reasonably requested to effectuate the terms of this Agreement.

6. In further consideration for this Agreement, Rodriguez and Ecuatoriana shall, by separate instrument, enter into a Settlement Agreement dismissing all pending State Court litigation in which Rodriguez and Ecuatoriana

are parties against each other. It is clearly understood by the parties that the Union is in no way involved with any of this litigation heretofore mentioned in this provision, number 6, and that any agreement to dismiss litigation between Rodriguez and Ecuatoriana is entered into without the advice and/or involvement and/or approval of the Union.

DATED at Miami, Florida on this 21st day of March, 1983.

FRANK RODRIGUEZ

EMPRESA ECUATORIANA
de AVIACION

INTERNATIONAL
ASSOCIATION OF
MACHINISTS AND
AEROSPACE WORKERS,
AFL-CIO